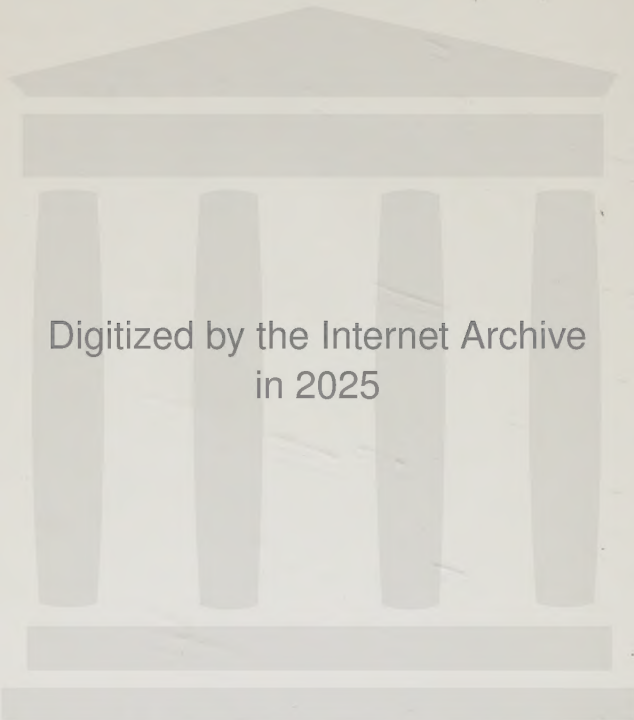




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Modern American Law

*A Systematic and Comprehensive Commentary on the
Fundamental Principles of American Law*

PREPARED BY

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BLACKSTONE SCHOOL OF LAW
CHICAGO

Modern American Law

DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

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INSURANCE

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EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION

BY

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VOLUME 5

BLACKSTONE SCHOOL OF LAW

CHICAGO

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1962 EDITION

Printed in the United States of America

PREFACE.

The institution of private property is at the same time the oldest and most persistent of all human institutions. One of the strongest desires in man is that of owning and enjoying property. This desire relates not merely to ownership during life, but extends to control after death. While one cannot take with him his property after death, still he can have a voice in its disposition when he must relinquish his own use of it. Hence, the Law of Wills—the first treatise in this volume—dealing with the power of the individual to dispose of property at his death, always has a strong personal appeal. Likewise, the Descent and Distribution of Property at death, which is treated along with the subject of Wills, touches very vital interests. The subject of Guardian and Ward is also included in this treatise.

The second treatise—covering the subject of Insurance, is no less interesting, for what is of more concern than the law governing the underwriting of one's risks of loss by fire and accidents, and the making of provisions for dependents after one's death? The principles of insurance in general and those applying to fire, life, marine, accident, guaranty, and liability insurance in particular are fully covered.

The third treatise, Employers' Liability and Workmen's Compensation, traces the changes in the law

due to new concepts in the present-day relationship of master and servant, and explains the principles under which regulatory acts, which have been adopted by all states, operate. It is a subject, which, while comparatively late in development, grows increasingly more important as the state gradually extends "social reforms."

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PART I

DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

BY

CHARLES S. CUTTING, LL.D.*

INTRODUCTION AND CLASSIFICATION

1. **Classification.**—It is proposed to deal with the subject of this text in three general parts, as follows: I. Descent, II. Wills, III. Probate of Wills and Administration. Generally, it covers the consideration of rights in, management of, control over, and disposition of decedents' estates. When the owner of any property, real or personal, dies, the disposition of such property becomes very important. Theoretically, at the death of the owner and in the absence of any law governing its disposal, the property would revert to the sovereign, being the state in this country. Law, however, provides for its distribution among such individuals as the owner may have designated before his death, and in absence of such designation, to certain of the kin of the owner, designated by law, provided that the creditors of the owner shall first have their claims satisfied out of the estate.

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To follow out this idea, the above arrangement of topics or parts is adopted as the readiest and simplest method of exposition. The law contemplates (1) a right and (2) a mode of securing the right. This right, as applied to decedents' estates, is found to vary according to two situations. Of these, the first situation logically to be considered is that where the owner of the property dies without having made provision for the disposal of his property after his death, i. e., he dies intestate (without a will), that being the simpler condition in which to leave the estate; and the other, where he dies leaving a will, i. e., testate, that being the more complex. Having determined the right, the law considers the remedy to be resorted to, to gain the enjoyment of the right, and to that end the law has entered into the proving of wills and the handling of decedents' estates by its courts and officers. This consideration is embraced in the subject of Probate of Wills and Administration. For convenience the law has set apart certain courts, or certain departments of courts, equipped with the machinery of proving wills and handling estates of decedents, called courts of probate or probate divisions or departments, and for convenience, also, these courts or divisions have, generally, been given the supervision of estates of minors and of persons not of sound mind. To conserve the property of these persons, the court appoints guardians, officers of the court, and the persons themselves become wards of the court. Thus the subject of Probate of Wills and Administration properly includes decedents' estates, and the laws

of Guardian and Ward, and will so be considered in this treatise.

2. **Descent.**—In dealing with the Law of Descent, it must be pointed out that the common law rules will be considered almost exclusively. Statutes have made great changes in almost all states so that a particular rule of descent depends upon the particular statutes in each state. The construction of these statutes even now depends very often upon the common law rules; so the important points of those rules are submitted in order to equip the reader with a working foundation from which to proceed in the light of the particular rules of his state. As an example of this operation of the common law, it is to be noted that most states have changed the common law rule of entailment, on the theory that it is incongruous with our present-day conditions to tie up property along a certain line of descent. Thus in Illinois there is a statute,¹ providing that persons who become seized of an estate that at common law would be an estate tail, instead of becoming seized of an estate tail in Illinois, should be held to have a life estate only, “and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on death of the first grantee” (the life tenant) “first pass, according to the course of the common law.” The course of the common law, thus, becomes important, and for that, reference must be had to the common law rules of descent.

¹ Illinois Revised Statutes, chap. 30, § 5. See subject, **REAL PROPERTY**.

3. **Wills.**—The treatment of Wills, herein, will omit in large measure all questions dealing with the nature of the estate that passes by the will, whether the will conflicts with the rule against perpetuities, or whether the rule in Shelley's Case applies; as it is considered that those matters are most properly dealt with under the subject of Real Property. The treatment of Wills, therefore, is to be confined to the consideration of matters having to do with the construction and execution of wills, and the operation of extrinsic influences thereon, wholly apart from the inquiry as to whether a certain clause in a will gives a life estate, or a fee, a vested remainder, or a contingent one; whether a gift is to a class or to individuals, and kindred topics, all of which belong more properly to the subject of Real Property.

4. **Administration.**—This topic deals essentially with the procedure to be followed in dealing with the goods of the deceased. As the procedure leading up to Probate of Wills, or the bringing of the estates into court, is also largely statutory, little time will be devoted to that. However, incidentally the powers of executors and administrators and their duties will be treated, and here also many of the common law rules are still in force. The rules governing trustees will not be followed out to any extent, but the subject of Trusts is referred to for that topic.

5. **Minors' estates.**—This topic will be treated under the head of Guardian and Ward, and will include the nature of the relationship, the mode of appointment of the guardian, his powers and duties.

DESCENT AND DISTRIBUTION

CHAPTER I.

DESCENT.

6. **Defined.**—The rules of descent apply to the disposition of the real estate of one who dies intestate, that is, without a will.

7. **Historical.**—The common law rules of descent are now practically historical, statutes throughout the United States having changed the common law wholly beyond recognition.

8. **Common law.**—The common law observed certain strict rules of descent, derived no doubt from the policy of the feudal law to have always someone as owner of property who could render his feudal dues to the overlord. These rules of descent are epitomized in what are known as the Canons of Descent, as follows:

1. Inheritances shall lineally descend to the issue of the person who last died actually seized in infinitum, that is, indefinitely, but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal

degree, the eldest only shall inherit, but the female all together.

4. The lineal descendants, in infinitum, of any person deceased shall represent their ancestor, that is shall stand in the same place as the person himself would stand, if he were living.

5. On failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

6. The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

7. In collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.

It must be borne in mind that, under the old common law, wills of real estate were not known, in fact, were not permitted, so that questions of testacy and intestacy did not concern real estate. After it became possible to will real estate, the laws of descent did not operate, of course, where the will designated the person to whom the land should go.

9. **Descent only as to real property.**—It must be observed also, that descent applied only to real estate. Personal property was governed by rules of distribution, which will be considered hereinafter. Under the old common law, personal property of deceased persons was administered in the ecclesi-

astical courts, and wills of personal property were known at a very early date.

10. **The canons.**—It is well to examine, then, these canons of descent more carefully, with a view to inquiring particularly what the rules there evolved really signify.

11. **How property descended.**—Before going into a consideration of each individual canon, it might be well to give a general outline of how property descended. It appears that the first descendants at common law were the children, then the children's children, and the children's children's children, and so on down, but even of these, the first to inherit were the boys; of those the eldest took first, and if he was dead, the next oldest, and so on. In case there were no male children, the inquiry was, were there any male descendants of male children? If it appeared there were none, the inquiry was directed to the female children, but here it was not the eldest that took, but all took equally. The feudal law, it is thus seen, had its first regard for the males.

Suppose now that there were no children or children's children, or descendants thereof: the property then went to the brothers, and if no brothers, to the sisters; but of the brothers, it would go to the eldest first; if the deceased was the middle one of three brothers, it would go to the eldest first and to the youngest next, and even if the deceased was the youngest, it would go to the eldest first.² If there were no brothers, it would go to the sisters equally. If there were no issue and no brothers or

² Lit., § 5 (Eng.).

sisters, the property would go to the collaterals, such as uncles and aunts, and cousins.

12. **Canon No. 1.**—If a son died without issue (i. e., children or children's children), leaving father living and also an uncle, his property went not to the father, though the father was nearest in blood, but to the uncle.³ That was because the property could not ascend, the feudal law finding it inadvisable to permit property to go from the offspring to the parents.

13. **Canon No. 2.**—So if a son died without issue leaving two uncles, one on his mother's side and one on his father's side, the one on the father's side would inherit all and the one on the mother's side nothing; if there were no uncles or male cousins on the father's side, the property would go to the mother's side. This, however, was true only of such lands as the son acquired by purchase, for if he inherited land from the father and died without issue and he had no brothers and sisters, and no uncles or male cousins on the father's side, but an uncle on the mother's side, the uncle on the mother's side could not take, but the land would escheat, that is, go to the lord of the manor.⁴ So also if the son inherited from the mother and he had an uncle on the father's side, that uncle could not take, but the land would go to the uncle or cousin on the mother's side, and if there were no heirs on the mother's side the land would escheat.⁵

14. **Canon No. 3.**—This canon has been explained above. The sisters take equally if there are no

³ Lit., § 3 (Eng.).

⁴ See ESCHEAT, § 24.

⁵ Lit., § 4 (Eng.).

brothers, or the aunts if there are no uncles, and so on.

15. **Canon No. 4.**—Suppose that property was to descend to lineal females of whom there were, say, three in equal degree, three sisters, A, B and C, of whom, however, two, A and B, died before the decedent from whom the descent is sought to be cast, and of the two sisters dying, A left only one child and the other, B, left three children. There would thus be the one child of A, the three children of B, and the surviving sister, C, all claiming. The property would still be divided into three parts instead of five, and the sole child of A would get one-third, the three children of B would get another third, and C would get the remaining third.

16. **Canon No. 5.**—This canon finds explanation in the above, except as to the meaning of “blood of the first purchaser.” The inquiry then arises, what does this mean?

First Purchaser. It has been shown that where property was inherited by a son from the father, and the son died, the children or issue of the son took, but that if the son died without issue, it would go to his brothers and sisters. If he died without brothers and sisters it would go to his collateral heirs, say his uncles or aunts, or his cousins. It has been shown, also, that if the property was bought by the son, it would go first to the uncles on the paternal side, and then to those on the maternal side, and then to all the aunts. In such case they would all be the collateral heirs of the “blood of the first purchaser,” to wit, the son. However, if the

property was merely inherited by the son from the father, who purchased it, and the son died without issue or brothers or sisters, it would never go to the uncles or aunts on the mother's side, for in that case the "first purchaser" would be the father, and the uncles and aunts on the mother's side would not be considered of the "blood of the first purchaser."

17. **One who takes by will a purchaser.**—Under the old common law, a purchaser was one who took by conveyance, either by gift or for valuable consideration. Later, when wills concerning real estate were recognized, one who acquired property by will was also a "purchaser";⁶ so that it was not necessary to have paid money or consideration in order to be a purchaser, so long as the property was not acquired by descent.

18. **Canon No. 6.**—The common law distinguished between half brothers and sisters, and brothers and sisters of the whole blood. One could not inherit from his half brother. Thus if a man had two sons, one by a first wife and the other by a second wife, and the eldest of the two sons obtained land by purchase and died, the property would go neither to the half brother nor to the father, but would go to the uncle or cousin of the deceased son, on the father's side. But if the first wife had a daughter also, the property would go to the sister.⁷ Suppose that the uncle on the father's side inherited and made an entry and then died without issue and without brothers or sisters. The property would then descend to the se-

⁶ *Opel v. Shoup*, 100 Iowa 407, LEADING ILLUSTRATIVE CASES.

⁷ *Lit.*, §§ 6 and 7 (Eng.).

ond son, the half brother of the eldest child, because as to the uncle on the father's side, the second son is of the full blood.⁸

Suppose, however, in the situation above mentioned, the father died and his lands descended to the eldest son, and after the son made entry, he also died. The property would not go to the half brother, but would it go to the sister? That brings us to the last canon.

19. **Canon No. 7.**—Under this canon it appears that the property would go to the uncles or cousins on the father's side, for property that comes from the father descends according to the father's line, just as property from the mother goes to the mother's line.

20. **Who last died actually seized.**—There are some additional points important to be considered in connection with descent. It is to be noted that Canon 1 provides that inheritances shall descend to the issue of the person who last died "actually seized." In § 18 in the illustration to explain the rule of descent under Canons 6 and 7, a hypothetical case was considered where the father died and his lands descended to the eldest son and where the eldest son "made entry." Suppose that the eldest son had died without making entry. The property would then have gone to the second son, being half brother to the eldest son. What is the reason for that, then, and what is meant by entry?

21. **Last seized.**—The common law required that in order for property to descend from a person it

⁸ Lit., § 8 (Eng.).

must appear either (1) that the person had obtained the property by purchase, or (2) if he obtained it by descent, that he was seized of the property at the time of his death. Property was not considered as passing by descent until the descendant took possession, and the act of taking possession was called entry.

22. **Entry.**—There were various ways of making entry. A physical entry was of course sufficient. However, an entry might be made by placing a tenant upon the land, or, where a tenant was already upon the land, it was considered that upon the death of the ancestor, the possession of the tenant at once inured to the benefit of the heir without his making any entry, or in fact, taking any steps to assert his right. Thus, under the old common law, an heir who inherited property from the ancestor was liable for the ancestor's debts, if he made entry upon the lands, i. e., if he accepted the inheritance by taking possession. Thus where at the time of the ancestor's death, a tenant was in possession, the heirs were held to be seized and liable for the debts. And this rule obtained notwithstanding the tenant after the death of the ancestor thought and recognized somebody else as the owner, and paid the rent to such other person.⁹

23. **Rule now changed.**—The rule has now changed, however, throughout this country, and land here invariably descends from the person "last entitled" instead of "last seized."¹⁰ Where, however,

⁹ *Bushby v. Dixon*, 3 B. & C. 298 (Eng.)

¹⁰ *North v. Graham*, 235 Ill. 178.

the statute of a state expressly provides that descent should be cast according to the rules of the common law, possibly the old rule of descent from the person "last seized" still obtains, as under the Illinois statute on entails, mentioned in § 2.

24. **Escheat.**—It was stated above, that in a case where one died without issue, and without brothers or sisters, property that had descended to him from the father's side would go to the uncles or cousins. Attention was called, also, to the rule that if there were no uncles or cousins, the property would escheat. The question then arises, what is escheat?

Where a person died without heirs, the common law gave his property to the overlord. Under the feudal law, someone was required at all times to stand ready to render the feudal dues to the overlord to the extent required of the particular estate held of such feudal lord. Upon failure of an under-tenant, it became necessary on that account to give the overlord the power to vest in a new tenant, and for that purpose, where heirs failed, the property escheated to the lord and he might then re-convey. In our country escheat sometimes occurs. Persons may still die without heirs. Here, however, the property escheats to the state, for the state is the sovereign here.

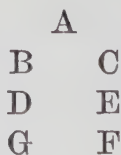
25. **Forfeiture and reversion.**—There were many ways in which land could revert to the overlord, other than by failure of heirs. Thus land might be forfeited by attainder; by defect of blood, as in case of bastardy; or where the heirs were all aliens. So, and this is true even at the present day in some

states, where a charitable corporation breaks up, the property escheats to the lord, or in this country, to the state.¹¹ One state in this country, however, adheres to a contrary rule, and considers that the property in such case should go to the original donors or their heirs, namely, those who had originally contributed the property to the charitable organization.¹²

26. Lineal and collateral.—Explanation should be made of the terms “lineal” and “collateral” employed so generally in the canons of descent here-inbefore quoted and referred to.

Consanguinity, or kindred, is defined by Blackstone as “the connection or relation of persons descended from the same stock or common ancestor.”¹³ Consanguinity is of two kinds:—(1) Lineal; (2) Collateral.

Lineal consanguinity is that existing between persons of whom one is descended in a direct line from the other. Where the descent is from the same stock or ancestor, but not in a direct line, the kindred are collateral.



Thus in the illustration, A-C-E-F and A-B-D-G are lineally related or descended, while C-B, C-D, C-G, E-B, etc., are collaterally related.

¹¹ Johnson v. Norway, Winch. 37 (Eng.).

¹² Life Ass'n v. Fassett, 102 Ill. 315; Mott v. Danville Sem., 129 Ill. 403; Presbyterian Church v. Venable, 159 Ill. 215.

¹³ 2 Blackstone, Commentaries, p. 202.

In computing the degrees of relationship or consanguinity, each generation counts as one degree. In estimating the degrees of lineal consanguinity, the civil, the canon, and the common law follow the same plan, that is, each generation is one degree. Thus in the illustration F is lineally three degrees from A.

In estimating collateral consanguinity, the common law and canon law began with the common ancestor and counted down to the claimant, and in whatever degree the claimant is distant from the common ancestor that is the degree in which he is related to the intestate. The civil law counted upward from the intestate to the common ancestor and then downward from him to the person in question, reckoning one degree for each step or generation, and the total number of steps indicated the degree of the relationship.¹⁴

Most of the states have adopted the rule of the civil law in computing the degrees of consanguinity.¹⁵

At the common law an alien could not take real property by descent, but this rule is quite generally changed by the statutes of the several states.

A person who murders the intestate, cannot acquire his property by inheritance, but such act does not destroy the inheritable quality of his blood.¹⁶

Upon the death of the intestate, his real property is usually deemed to vest at once in his heirs by operation of law, without any order or decree of court, though it may be subject to contribute to the

¹⁴ 2 Blackstone, Commentaries, pp. 206, 207, note.

¹⁵ Cooley, Blackstone's Commentaries, vol. II, p. 207, note.

¹⁶ Deen v. Millican, 6 Ohio C. C. 357.

payment of debts in case of an insufficiency of personal property.¹⁷

27. **Who is heir at common law?**—Thus it is seen that at common law, the “heir” was the relative next in the order of descent, or the nearest collateral relative. Neither a husband nor a wife nor a bastard could be heir.

28. **Under statute—Widow.**—Statutes have, however, changed the rule. Where, at common law, a wife had her dower right in the deceased husband’s real estate, and her widow’s award out of his personalty, and nothing more, statutes now invariably make her an heir of the husband to part or all of his estate where he dies without issue surviving him. The question, then, what standing a widow has under such statutes often arises where a will gives property to “my heirs.” Does the widow come within such a designation? Doubtless she does. Thus a will that gave property to my “right heirs,” was held to include the widow in that term where the statute made her an “heir” of her husband.¹⁸

29. **Legitimated children.**—The same situation is often encountered where the statute provides, in the case of illegitimate children, that the subsequent marriage of their parents shall legitimate them. That was not true at common law. Would then such an act make a legitimated child an heir within the meaning of that term appearing in a will? It seems that it would.¹⁹

¹⁷ *Overturf v. Dugan*, 29 Ohio St. 230.

¹⁸ *Peabody v. Cook*, 201 Mass. 218.

¹⁹ *In re Wardell's Estate*, 57 Cal. 484.

CHAPTER II.

DISTRIBUTION.

30. **Definition.**—Rules of descent apply to real estate and not to personal property. Rules of distribution apply to personal property and not to real estate.

31. **In general—Provisions of the Statute of Distribution.**—Unlike the real estate, the personal property of the intestate does not descend at once to the heirs. At the death of an individual, the personal property does not belong to the kin of the deceased, but is charged with the payment of his debts. With the view of seeing to its application for this purpose the courts take charge of it, and appoint an officer of the court to administer upon it. This person theoretically takes the place of the deceased and is called his personal representative or administrator.

The administrator is charged with the duty, first, of payment of the debts, and then, with the duty of distributing the remainder according to the Statute of Distribution prevailing in the jurisdiction of the domicile of the owner at the time of his death.

The persons entitled to take under the statutes of descent and those entitled to take under the Statutes of Distribution are often, but not necessarily, the same. And under most of such statutes the sur-

viving husband or wife is given a greater share in the personal than in the real estate.²⁰

The distribution of the personalty is usually postponed until the final settlement of the estate. But in many states, provision is made for an earlier distribution, in whole or in part, if refunding bonds are given by the distributees to provide for the return of the property distributed, or its value, in case it becomes necessary to pay demands upon it.

In most cases, and regularly, a decree of distribution is made by the proper court, which decree determines the persons entitled to share and the respective proportions which each is to take. But the personal representative often takes the risk of distributing the personalty without such a decree.

The right of a distributee to his share is usually deemed to be vested at the time of the death of the intestate, though his right to possession, the amount of his share, and the specific property to be assigned to him are not fixed until the decree of distribution.

If a distributee dies, pending distribution, his share will be payable to his personal representatives. And a distributee may assign his interest, pending distribution, in which case his share will be paid to his assignee.

Debts due from a distributee to the deceased will be deducted from his share, and so will advancements, made to him by the deceased in his lifetime.²¹

The distributee may maintain an action against the personal representative of the intestate to re-

²⁰ See typical statute, p. 19.

²¹ *Dittoe's Admr. v. Cluney's Exrs.*, 22 Ohio St. 436; *Parsons v. Parsons*, 52 Ohio St. 470.

cover his distributive share, after a decree of distribution has been made and is uncomplished with. But in many states a summary remedy is provided by statute and may be used in such cases to compel the personal representative to distribute the estate.

TYPICAL STATUTE ON DESCENT AND DISTRIBUTION.

Illinois Revised Statutes. Chapter 3

Article II of Probate Act

§ 11. Rules of Descent and Distribution. The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:

First, when there is a surviving spouse and also a descendant of the decedent: one-third of the personal estate and one-third of each parcel of real estate to the surviving spouse and the remaining two-thirds to the decedent's descendants per stirpes but, if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, the one-third of the parcel vested at the decedent's death in the surviving spouse is thereupon divested and such descendants thereupon become vested with the entire parcel subject to the dower of the surviving spouse.

Second, when there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.

Third, when there is no descendant but a surviving spouse and also a parent, brother, sister, or descen-

dant of a brother or sister of the decedent: the entire personal estate and one-half of each parcel of real estate to the surviving spouse and one-half of each parcel of real estate to the parents, brothers, and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living, but, if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, the one-half of the parcel vested at the decedent's death in the surviving spouse is thereupon divested and such other persons thereupon become vested with the entire parcel subject to the dower of the surviving spouse.

Fourth, when there is a surviving spouse but no descendant, parent, brother, sister, or descendant of a brother or sister of the decedent: the entire estate to the surviving spouse, but, if the surviving spouse elects to take dower in any parcel of real estate as provided in Section 19, all of the parcel vested at the decedent's death in the surviving spouse is thereupon divested and the entire parcel, subject to the dower of the surviving spouse, thereupon becomes vested in the decedent's nearest kindred as provided in rule sixth or, if there is no known kindred, escheats as provided in rule seventh.

Fifth, when there is no surviving spouse or descendant but a parent, brother, sister, or descendant of a brother or sister of the decedent: the entire estate to the parents, brothers, and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have

taken if living.

Sixth, when there is no surviving spouse, descendant, parent, brother, sister, or descendant of a brother or sister of the decedent: the entire estate in equal parts to the nearest kindred of the decedent in equal degree (computing by the rules of the civil law) and without representation.

Seventh, when there is no surviving spouse or known kindred of the decedent: the real estate escheats to the county in which it is located; the personal estate escheats to the county of which the decedent was a resident or, if the decedent was not a resident of this state, to the county in which it is located.

In no case is there any distinction between the kindred of the whole and the half blood.

§ 12. Illegitimates. (Practically the same rules of descent are repeated as given above in the case of legitimates.)

An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate.

§ 13. Posthumous Child. A posthumous child of a decedent shall receive the same share of his ancestor's intestate estate as if he had been born in his father's life time.

§ 14. Adopted Child and Adopting Parent. A

child lawfully adopted is deemed a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the lineal and collateral kindred of the adopting parent.

An adopting parent, and the lineal and collateral kindred of the adopting parent, shall inherit property from a child lawfully adopted to the exclusion of the natural parent and the lineal and collateral kindred of the natural parent, in the same manner as though the child lawfully adopted were a natural child of the adopting parent, except that the natural parent and the lineal or collateral kindred of the natural parent shall take from the child and the child's kindred the property that the child has taken from or through the natural parent or the lineal or collateral kindred of the natural parent by gift, by will, or under intestate laws.

For purposes of inheritance from the child and his kindred, (1) the person who at the time of the adoption is the spouse of an adopting parent is deemed an adopting parent and (2) a child is deemed lawfully adopted when the child has been heretofore or is hereafter declared by any court to have been adopted or has been heretofore or is hereafter declared or assumed to be adopted child of the testator or grantor in any will or deed bequeathing, devising, or giving property to the child.

When an adopted child is related by blood to the adopting parent, the adopted child and his descendants shall take property from the estate of the adopting parent only as an adopted child or descendants of an adopted child and not as relatives by blood.

§ 15. Advancements. In the division and distribution of the estate of an intestate decedent, real or personal estate given by him in his lifetime as an

advancement to a descendant shall be considered as part of the decedent's estate and applied on the share therein of the person to whom the advancement was made or, if he died before the decedent, on the share therein of the descendants of the person to whom the advancement was made. A gift is not an advancement unless so expressed in writing by the decedent or unless so acknowledged in writing by the person to whom the gift was made.

If the value of the advancement is expressed in the writing made by the decedent or, if not so expressed, in the written acknowledgment by the person to whom the advancement was made, it shall be considered as of that value; otherwise, it shall be considered as of the value when given. The person to whom the advancement was made shall not be required to refund any part of it, although it exceeds his share in the entire estate; but if an advancement in real estate exceeds his share in the real estate, the excess shall be deducted from his share in the personal estate and, if an advancement in personal estate exceeds his share in the personal estate, the excess shall be deducted from his share in the real estate.

32. Statutes of distribution and the common law.

—Under the early common law the administrator was entitled to the balance of the personal estate after payment of debts, i.e., to the residue, as his own. Statutes, early, changed this rule and provided that the residue of such property, if not disposed of by will, should go to the next of kin, who were the kin or relations of the deceased nearest to him in degree of relationship. Later statutes went further and

pointed out who the persons entitled to share in the distribution should be, and the modern statutes, of which the above is a fair example, make no distinction between those entitled as heirs and those entitled as next of kin or distributees of personal estate.

33. **The Illinois statute examined.**—Examination of the statute above set forth discloses the general scheme of distribution. The various sections are self-explanatory, but attention is called to the rule that there shall be representation among brothers and sisters. By this is meant that if A dies leaving one brother who has three children, and had a brother and a sister, both of whom died before A, the brother leaving one child and the sister, four children, all of whom are alive at A's death, A's property will be divided into three shares, and the deceased brother's child will get one of the shares, the deceased sister's children will divide another share among them, and the living brother will get the third share. Suppose, now, that A had no brothers or sisters or descendants of brothers or sisters, but that he had three cousins, of whom one had one child, a second three children and the third, four children. Suppose that the cousins died before A, but that the children all survived him, so that at A's death, his next of kin were the one child of the one cousin, the three children of the other cousin, and the four of the last. If the rule of representation applied here as well, the property would be divided into three parts, and the one child of the one cousin would get one-third of A's property, each of the three

children of the other would get one-ninth each, and each of the four children of the last cousin would get one-twelfth each. However, they do not take by representation but per capita (by the head)—only brothers and sisters take by representation, i. e., per stirpes (through the root)—and therefore each of the children of the three cousins would get one-eighth.

Another provision in the Illinois statute that requires comment is the provision in the sixth paragraph of section 11 that under certain conditions the property shall descend according to the rule of the civil law. Explanation of the distinction between the civil rule of counting descent and the canon rule is found above in § 26.

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER III.

WILLS DEFINED.

34. **Definitions.**—A “Will” or “Last Will and Testament,” is a solemn disposition of one’s property in the form prescribed by law, which, though made while living, does not take effect until the death of the maker.²²

Blackstone’s definition of a will, “the legal declaration of a man’s intentions, which he wills to be performed after his death,” is derived from that of the old Roman writers; and he says it is called a “will” in England because “its efficacy depends on its declaring the testator’s intentions.”²³

The word “will,” in its popular meaning, now in-

²² “A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which, in its own nature, is ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument.” *McDaniel v. Johns*, 45 Miss. 632; 1 *Jarman, Wills* (5th Amer. ed.), p. 16.

²³ 2 Blackstone, *Commentaries*, p. 500.

cludes the disposition of both real and personal property, though in its technical and historical sense, it designated an instrument disposing of realty only.²⁴

A person making a will is called the "testator" when a man, and the "testatrix" when a woman. One who dies leaving a will disposing of his property is said to die "testate"; if without a will, "intestate."

The granting words usually employed in a will are "give," "devise," and "bequeath." Of these the word "give" is the most comprehensive and may be used in reference to the transfer of any sort of property.

"Devise" is appropriately used in connection with real property, and "bequeath" when the will is of personal property. Likewise the word "devise," when used as a noun, signifies, when correctly used, disposition of realty, and "bequest," of personalty.

²⁴ "A will, or last will and testament, is a solemn act or instrument whereby a person declares his mind and intention as to the disposal of his lands, goods or effects, and what he would have done after his death."—Co. Lit., chap. 10. "And the common law calls that a *will* where lands or tenements are given; and where it concerns goods and chattels alone, it is termed a *testament*."—Ibid.

"A will is a legal declaration of a person's intentions, to take effect after his death. The essential difference between a will and any other instrument or provision contingent upon death is that a will has no effect whatever until death, and may be freely revoked meanwhile; but a deed which may create or convey an estate in the event of death must take effect as binding the grantor in his lifetime. In English law the word *will* was originally used only of a disposition of *real* property to take effect after death; the word *testament* being then used, as in the Roman and civil law, of a disposition of *personal* property; hence the phrase, now redundant, *last will and testament*. In modern usage the term *will* does not necessarily imply an actual disposition of property; for, an instrument, executed with the formalities required by law, in which the testator merely appoints a guardian for his child, or merely nominates an executor, leaving the assets to be distributed by the executor among those who would take by law, is a will." Century Dictionary, "Will."

“Legacy” is a word used to designate the gift of a sum of money. However, the technical, or real meaning of these words, is not so strict but that a gift will prevail, although the testator does not use them correctly. Thus a “bequest” may include both realty and personalty.²⁵ And a “devise” will prevail, although miscalled a “bequest.”²⁶

The word “testator” is the common designation of a person making either a will or testament; while “devisor” is the correct name for one who makes a will, but the term is little used.

“Devisee” is the proper and legal word used to denote one to whom realty passes by will; while “legatee” is properly used in naming one to whom personalty passes by will. These words, however, are frequently interchanged in their usage.

35. Same subject—Written and unwritten wills.—Wills are of two kinds: (1) Written. (2) Unwritten, or nuncupative.

A written will, as the name suggests, is one in writing. When such a will is entirely written by the testator himself it is called a holograph, spelled also olograph. These holographic wills are made valid by statute in some of the states without the formalities of attestation required of other wills.²⁷

Unwritten, or nuncupative, wills are usually valid only where the testator was overtaken by sudden illness and had no time to make a written will. By statute in the various states, and in England, the power to make a nuncupative will is quite generally

²⁵ *Evans v. Price*, 118 Ill. 593.

²⁶ *In re White*, 125 N. Y. 544.

²⁷ 3 *Jarman, Wills* (5th Amer. ed.), p. 767, note.

restricted to soldiers in service and sailors upon a voyage, who are only allowed to dispose of personal estate in this manner, and that usually only to the extent of a few hundred dollars, the reason being the great hazards attending the correct reporting of wills so made.²⁸

36. Same subject—Codicil defined.—A codicil is a supplement, or addition, to a will, made after the will and designed to alter or add to it. It may or may not be a separate instrument.²⁹

37. Same subject—A will distinguished from a gift.—A will differs from a gift in this respect: it is not intended to operate or take effect until the

²⁸ Prince v. Hazleton, 20 Johns. 502 (N. Y.); Cooley's Blackstone, vol. II, pp. 501, note.

An interesting account of the practice of the Civil Law in regard to the disposal of personal property by soldiers and sailors is contained in the case of Gould v. Safford's Estate, 39 Vt. 498, in which the court said: "Nuncupative wills were not forbidden by the Statute of Frauds, but they were placed by it under such restrictions as practically abolished them, and the courts have enforced these restrictions by uniformly holding that the provisions of the statute must be strictly complied with to entitle any such will to probate. The Statute of Frauds provided that, notwithstanding the statute, any soldier being in actual military service, or any mariner or seaman being at sea might dispose of his movables, wages, and personal estate as he or they might have done before the making of the statute. The civil law was very indulgent in respect to the wills of soldiers, and if a soldier wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was held a good military testament. No particular formalities were necessary to the validity of such a testamentary disposition of property; and we are told by Swinburne, whose treatise on wills was published before the Statute of Frauds was enacted, that only those solemnities were necessary which are juris gentium; that no precise form of words was required, and that it was not material whether the testator spoke properly or improperly, if his meaning appeared; and that soldiers are clearly acquitted from the observation of the solemnities of the civil law in the making of their testaments."

²⁹ "Codicil, a supplement or addition to a will. It may change the dispositions of the will, or even revoke some of them, but does not revoke the entire will. The term codicil implies that the will, as modified by the codicil, stands."—Abbott's Law Dictionary.

death of the testator, no title of any kind vests in those who take under it until that time, and it is subject to revocation at any time before the testator's death. A gift, on the other hand, must take effect in the present.

Gifts are of two kinds: (1) Gifts *inter vivos*, (2) Gifts *causa mortis*.

By a gift *inter vivos*, that is, between the living, is meant a gift in the ordinary sense of the word; while gifts *causa mortis* are those made in contemplation of immediate death, and which become invalid if the person making the gift recovers. In either case, however, to make a gift valid a present title must vest in the donee.

To constitute a valid *donatio causa mortis*, it is not only essential that delivery to the donee shall be complete during the donor's life, but the donee must also take and retain possession until after the donor's death. Then in case the donor dies, the gift becomes complete; if he recovers, the title reverts to him.³⁰

³⁰ Appeal of Walsh, 122 Pa. St. 177; 9 Am. St. Rep. 83.

Donatio mortis causa.—"A gift in expectation of death, a gift of personal property made by a person in contemplation of his own death by delivery of the property to another to keep as his own in case of the donor's decease. The subject of such a gift can be personal property only; and, to constitute a valid *donatio mortis causa*, it must be made in actual peril of the death, and to take effect only in case of the death of the donor, and there must be an actual delivery of the property, or for the use of the donee, if such delivery can be made, according to the manner in which it is capable of being delivered. The gift is conditional, dependent upon the contingency of expected death, and is revocable during the life of the donor, therein differing from a gift *inter vivos*. It differs from a legacy in that it does not require any proceeding in the court of probate, or any assent or action on the part of the executor, to perfect the title of the donee."—Abbott's Law Dictionary.

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

38. **Origin of wills coincident with the rise of private property.**—Among very primitive peoples there was neither personal property nor realty in the hands of the individual and consequently there could be no subject matter for wills. With the development of property rights in the individual came also the custom or privilege, sanctioned by the public sentiment of the community, of allowing the owner to designate who should succeed to his holdings, and also a general rule indicating who should take the property of a deceased person when he failed to dispose of it himself. These rules or customs were not always the same, and varied according to the theory of descent prevailing in the community where they had their origin.

In nearly all primitive nations property belonged to the community as a whole, and the right of the individual was to use, but not to segregate it, though later, and by degrees, the right of the individual to the lands surrounding his own habitation became recognized.³¹

Wills are thus of very ancient origin, their use and legal sanction having been well known to the Greeks and Romans. In England at the time of

³¹ Page, Wills (1st ed.), p. 5.

the Norman Conquest, wills of both real and personal property were common. In the Roman law the will, though originally a public and irrevocable act, had come, prior to the time of Justinian's Code, to have a striking similarity in its elements and effects to the modern will.

39. The status of the will in England prior to 1066.—Prior to the Norman Conquest, A. D. 1066, the Anglo-Saxon law recognized the right of the owner to will both personal and real property, although some authorities seem to think that this right was not general, but confined only to great personages, as the king, bishops, earldormen and the like.³² It is quite possible that only such persons had property sufficient to warrant the trouble of making a will. There is some doubt also whether this pre-Norman will was revocable or not, after being made.³³

40. The status of the will after 1066 A. D.—The Conquest of England by the Normans in 1066 A. D., and the introduction of the feudal system, or the theory that all land belonged to the king and was leased or rented out by him to his head men upon their rendering military services,—naturally put an end to the disposition of land by will, as the two theories were incompatible.

The will, however, did not give place to the theory of the feudal system without a struggle, and though the common law held that land could not be trans-

³² Pollock and Maitland, *History of English Law*, vol. II, p. 318; Page, *Wills* (1st ed.), p. 7.

³³ Pollock and Maitland, *History of English Law*, vol. II, pp. 318-319.

erred by will, there were, in Kent and some other boroughs and manors, exceptions to the general rule, and in these places lands could be devised. Personal property remained free to be disposed of by will, and an estate for years, being considered as personality, could be disposed of by will.³⁴ Real estate, however, could not be so disposed of.

In 1285, the Statute De Donis³⁵ was passed, making the conditions in the deed or grant of the donor obligatory, and it was thought that where the word "devisee" was used in a deed of lands, such lands could thereafter be disposed of by will. But the courts held otherwise.³⁶

41. The attempt of the courts of equity to revive the right to will lands.—In the fourteenth and fifteenth centuries the courts of equity in England undertook to modify the common law rule forbidding the disposition of lands by will. They did it in this way: the conveyancers had invented a plan by which the owner of land could deed it to a grantee to hold to the grantor's use, or to the use of any other person he might designate, and the equity courts would enforce the conditions of this grant; so when the grantor undertook to appoint to this use by will, the equity courts continued to uphold and enforce the use, thus practically making land, or its benefits, devisable.

In 1535, Parliament attempted to put an end to this roundabout method of devising land, through

³⁴ 2 Blackstone, Commentaries, p. 375.

³⁵ 13 Ed. I, Stat. I.

³⁶ Pollock and Maitland, History of English Law, vol. II, p. 27.

the doctrine of uses, by passing what is known as the Statute of Uses.³⁷ The Statute of Uses provided in effect that the "seisin," or title, should follow the use and that the person taking the use should, in law, take the entire legal title. So when the grantor devised to his own use, he still held the legal title; and when he devised to the use of a third person, such person was thereby put into possession of the full legal estate.

This statute would have put an end to the devising of lands in England, had not the equity courts, in their attempt to outwit Parliament and the common law, devised a new expedient. The method used was to interpose a second trust, that is, lands were deeded to A for the use of B in trust for C, and the equity courts simply upheld C's beneficiary interest, and allowed such an interest to be created by will.³⁸

42. **The Statute of Wills.**—In 1540, just five years after the passage of the Statute of Uses, Parliament passed the Statute of Wills,³⁹ which was followed in 1542-43 by an act to interpret the Statute of Wills.⁴⁰ The purpose and effect of these two acts was to remove the restriction upon the devise of land at common law; under these statutes persons holding lands in fee simple, or in socage tenure, were enabled to devise the same at their will and pleasure, except to bodies corporate; and those who held estates by the tenure of chivalry were enabled to devise two-

³⁷ 27 Hen. VIII, chap. 10.

³⁸ 2 Blackstone, Commentaries, pp. 375, 376; see also subject, REAL PROPERTY.

³⁹ 32 Hen. VIII, chap. 1.

⁴⁰ 34-35 Hen. VIII, chap. 5.

thirds thereof.⁴¹ The Statute of Wills, 34-35 Henry VIII, declared "wills or testaments made of any manor, lands, tenements or other hereditaments, by any woman covert, or person within the age of twenty-one, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in law."

From 1652 to 1659, under Cromwell, the feudal theories pertaining to the tenure of lands in England were disregarded, and after the Restoration of the monarchy, could not be revived, and nearly all lands thus came to be held by their possessors in fee simple.

The feudal system did not affect the disposition of personal property by will, and all through the Norman period the right to make testamentary bequests prevailed. But in some parts of England, if not in the whole country, about the end of the twelfth century, the testator could only dispose of the whole of his personal property by testament in case he left neither wife nor children; otherwise he could dispose of but a third of his personal property. One-third went to his wife, and was known as the "wife's part," one-third to his children, and known as the "child's part," or "bairn's part." In case he left only wife or children, he could dispose of one-half his property, the other half going to his wife or children.⁴² This limitation upon the power of the testator came to be known as the doctrine of reasonable parts.

⁴¹ "The effect of these two acts was to enable all persons except feme coverts, infants, idiots and persons of non-sane mind and memory to devise by will and testament, in writing, two-thirds of their land held by Knight's services and all lands held by socage tenure. The beneficiary could not be a corporation by the terms of these statutes."—Page, Wills (1st ed.), § 13.

⁴² 2 Blackstone, Commentaries, p. 492.

This limitation on the power of the testator soon faded away, and by 1625, in the beginning of the reign of Charles I, it was the general rule throughout England that a testator could dispose of all his personal property, except in those districts where the old law still existed.⁴³ The Statute of I Vict. c. 26, passed in 1837, gave the testator the unlimited power of disposing of his personal property.

43. History of wills and testaments in the United States.—In the United States each state has its own Statute of Wills, by which the questions of capacity, form, execution, and effect are determined. These statutes are based upon the English common law as modified by the Statute of Wills and subsequent statutes in England up to the time of the Declaration of Independence. In a few states settled by the French and Spanish, the law is colored by the French and Spanish law.⁴⁴

44. Extent of testamentary power—General rule.—It was shown in previous chapters that none of the restrictions incident to feudal times and which prevailed under the English common law became operative in the United States. And the general rule as to testamentary power in this country is, that all property, both real and personal, corporeal and incorporeal, vested and contingent, legal or equitable, which the owner may be entitled to at the time of his

⁴³ 2 Blackstone, Commentaries, p. 493.

⁴⁴ "The net result may be said to be, that in the greater part of the United States, the law of wills is of pure English origin, modified by modern statutes, showing some influence of Spanish and French law in some of the Southern and Western States; while in Louisiana the law of wills is of French-Roman origin, gradually yielding in some respects to the influence of the remaining common law states."—Page, Wills (1st ed.), § 19.

death, may be disposed of by his lawfully executed will.⁴⁵

This general rule covers only such property as the testator owns, and his right to dispose of property by will is always subject to the payment of all his just debts, liens, incumbrances, or other obligations created in his lifetime. And though his will dispose of all his property, creditors can assert their claims and have them paid out of the devised property.⁴⁶ In general, subject to the restrictions above named, a competent testator may dispose of his property as he pleases. He may select such of his children or relatives as he desires for his beneficiaries, or he may pass them all by and leave his property to strangers.⁴⁷

45. Same subject—Exceptions to the general rule
—To the general rule that all of testator's property can be disposed of by will, certain exceptions, usually statutory, and substantially uniform throughout the United States, are to be noted:

1. The expenses of administration and statutory allowances for the support of the widow and the

⁴⁵ Page, Wills (1st ed.), §§ 143-148; *Harvard College v. Balch*, 171 Ill. 275; *Tompkin's Est.*, 154 N. Y. 634; *Allen's Succession*, 49 La. Ann. 1096; *Dodge v. Gallatin*, 130 N. Y. 117; *Cressinger v. Welch's Lessee*, 15 Ohio 156. A representative statute provides that "Any person of full age, and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed."—Rev. Stats. of Ohio, § 5914.

⁴⁶ *Kimball v. Bible Soc.*, 65 N. H. 139; *In Re Kidd*, 3 Ch. Div. 558 (Eng.); *Young v. Snow*, 167 Mass. 287.

⁴⁷ It must be understood, however, that for a testator to disinherit his heirs at law, he must, either expressly or by necessary implication, devise all of his property to others, and unless this is done the heirs at law will be entitled to the estate.

minor children of the testator during the settlement of his estate, are usually made a charge upon the testator's property.⁴⁸

2. The widow's dower is usually preserved to her and takes priority over a devise of the realty, unless other provisions are made for her in the will which she elects to accept in lieu of her statutory right of dower, or unless it is waived by an ante-nuptial contract. Where the husband has similar interests in his wife's realty, he cannot be deprived of them by her will to which he does not consent.⁴⁹

In a few states she may have both the property bequeathed in the will and her dower. But the general rule is different, and she may have both only in case it plainly appears by the will to have been the intention of the testator that she should have both.⁵⁰

3. The homestead interest of the widow and the children of the testator, given in some states, cannot be barred by the testator's will.⁵¹

4. In some states, certain interests in the husband's personal property are reserved by statute to the widow, and where this is done he cannot by will divest her of such property.⁵²

5. In a few states, the property acquired by husband and wife is regarded as community property, or

⁴⁸ Rev. Stats. of Ohio, §§ 6038-6040.

⁴⁹ *Cook v. Adams*, 169 Mass. 186; *Warren v. Warren*, 148 Ill. 641; *Spangler v. Dukes*, 39 Ohio St. 642; *Wilber v. Wilber*, 52 Wis. 298.

⁵⁰ Rev. Stats. of Ohio, § 5963; *Collier v. Collier's Exrs.*, 3 Ohio St. 369.

⁵¹ *Peebles v. Bunting*, 103 Ia. 489; *Schorr v. Etling*, 124 Mo. 42; *Matheny's Est.*, 121 Cal. 267; *Wells Estate v. Congregational Church*, 63 Vt. 116.

⁵² *Cummings' Exr. v. Daniel*, 9 Dana 361 (Ky.); *Tyler v. Wheeler*, 160 Mass. 206. So in Ohio, without express statute, *Doyle v. Doyle*, 50 Ohio St. 330.

bequests," which belong equally to the husband and wife, so that neither can dispose of the interest of the other by will.⁵³

6. Posthumous children, or children born after the death of the testator and not provided for in the will, usually take as if their parent had died intestate. In some states, if the testator had no children at the time of executing his will, and a child is subsequently born, such will is deemed revoked, unless such child was provided for in the will, or so mentioned as to show the intention of the testator not to provide for it.⁵⁴

7. Living children not provided for in the will of the testator are usually allowed to take as heirs, unless it appears from the will that their omission was intended.⁵⁵

8. In a number of states the statutes provide that a testator leaving a wife and children, cannot devise or bequeath his property to a charitable corporation or for charitable purposes, unless such will is executed a specified time before the death of the testator.⁵⁶ In Ohio this time is fixed at one year.⁵⁷ But it is held that no one can take advantage of such defective will except those who would otherwise take the property which has been devised to the charitable purpose.⁵⁸

⁵³ *Mayo v. Tudor's Heirs*, 74 Tex. 471; *Sharp v. Loupe*, 120 Cal. 89; *Cox v. Ahlefeldt*, 50 La. Ann. 1266.

⁵⁴ Rev. Stats. of Ohio, § 5959.

⁵⁵ *Rhodes v. Weldy*, 46 Ohio St. 234.

⁵⁶ *Fairchild v. Edson*, 154 N. Y. 199; *Wetter v. Habersham*, 60 Ga. 193; *Uebbe's Est.*, 179 Pa. St. 447; *Milwaukee Protestant Home v. Beecher*, 87 Wis. 409; *Schmidt's Est.*, 15 Mont. 117.

⁵⁷ Rev. Stats. of Ohio, § 5915.

⁵⁸ *Trustees Ohio St. Univ. v. Folsom*, 56 Ohio St. 701.

9. In some states the statutes protect the wife and children of the testator from being barred by his will in favor of his mistress or illegitimate children. Thus in South Carolina, a testator leaving a wife and legitimate children cannot devise more than one-fourth of the clear value of his property to such persons and no devise will be permitted to evade the provisions of such statutes.⁵⁹

10. Another general statutory restraint upon the power of the testator to devise his property, is the statute or rule governing perpetuities. This rule of law is of long standing and is designated to prevent the postponement of the transfer of the legal title to real property beyond a reasonable time. The rule as generally fixed, both in England and the United States, provides that the vesting of the title of any estate cannot be postponed, upon a condition precedent, for a longer time than the life or lives of persons in existence at the creation of the estate, and twenty-one years thereafter.⁶⁰

11. The interest which the testator may dispose of by will must be one which survives him and is not limited to his lifetime, as an estate for life.⁶¹ So while a testator has the power of disposing of an insurance policy upon his life which is made payable to his estate or his executors, he cannot by will change the beneficiary, when one has been named

⁵⁹ *Breithaut v. Bauskett*, 1 Rich. Eq. 465 (S. C.); *Gore v. Clarke*, 37 S. C. 537; *Beaty v. Richardson*, 46 L. R. A. 517.

⁶⁰ *Madison v. Larmon*, 170 Ill. 65; *Terrell v. Reeves*, 103 Ala. 264; *Rev. Stats. of Ohio*, § 4200; see subject, REAL PROPERTY, for more complete treatment.

⁶¹ *Young v. Snow*, 167 Mass. 287; *Studdard v. Wells*, 120 Mo. 25.

and the rules of the company provide that the beneficiary must be named in a particular way, as by an order acknowledged before a justice of the peace.⁶²

46. Same subject—After-acquired real estate.—Under the old English Statutes of Wills, a will did not pass real property acquired subsequently to the execution of the will even though the testator expressly provided that it should pass. After-acquired personalty did pass where the will covered it. The reason for the distinction was that personal property could be willed as at common law, whereas real estate could not. When later it became possible to will real estate, it was solely because a statute made it possible to do so. The statute being in derogation of the common law was construed strictly, and as the early English statutes contained no provision for passing after-acquired real property by will, it did not pass.

Modern statutes of wills almost without exception provide for the devise of after-acquired property. Thus the Illinois Statute of Wills empowers a testator to devise all his property which he "hath or at the time of his death or her death shall have."⁶³ However, the will must express the intention that after-acquired property actually pass by it.

47. The testator's right to make a will is not a property right.—While the right to make a will is general, and may be exercised by all, under certain

⁶² *Mellows v. Mellows*, 61 N. H. 137; *Wilburn v. Wilburn*, 83 Ind. 55; *Ingrey v. National Life Ins. Co.*, 144 Mass. 374; *Masonic Benevolent Assoc. v. Bunch*, 109 Mo. 560; *Arthur v. Odd Fellows Assoc.*, 29 Ohio St. 557; *Hartwig v. Schiefer*, 147 Ind. 64; *Fox v. Senter*, 83 Me. 295; *Hannigan v. Ingraham*, 55 Hun 257 (N. Y.).

⁶³ *Cummings v. Lohr*, 246 Ill. 577, LEADING ILLUSTRATIVE CASES.

limitations, yet this right or privilege to dispose of one's property, to take effect at death, is not, and has never been, considered an absolute property right, so as to be protected by the various constitutional provisions designed to uphold and guard private property. As was seen in the previous chapters, the right to dispose of real estate by will did not exist at the early common law, and the disposition of real property by will has been a matter of gradual allowance, depending for the most part upon express statutory provisions, and at no time independent of legislative control.

The power to make a will is to be regarded, therefore, as a statutory right and not a natural or absolute right.⁶⁴ The legislature or sovereign authority in a state may not only prescribe regulations governing the making and construction of wills, but may also at any time qualify and limit the power to dispose of property by will. And this may be done after the real property sought to be disposed of by will has been acquired.⁶⁵ And the fact that the statutory changes in the law governing wills are made after the will has been executed by a living testator, and are intended to apply thereto, does not make such changes infringe any constitutional provisions.⁶⁶

⁶⁴ Blackstone observes that the variety of laws and usages in regard to wills, and the further fact that there were countries where wills were not allowed, "serves to evince, that the right of making wills and disposing of property after death, is merely a creature of the civil state, which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven." 2 Blackstone, Commentaries, p. 491.

⁶⁵ *Patton v. Patton*, 39 Ohio St. 590.

⁶⁶ *Blackbourn v. Tucker*, 72 Miss. 735, where a change in the law after the execution of the will but during the life of the testator, operated to render void the gift to a charity.

In order that new laws governing wills may effect devises previously executed, the intention of the legislature must be plain, otherwise the law will be held to apply only to subsequently executed wills.⁶⁷

48. **Agreement to will.**—Nevertheless this power to make a will is not so strictly personal to the testator that he may not by contract pledge himself to a particular disposition of his property by his will. Just as it is possible to make a contract to do any other lawful act, a contract may be made to will property to a certain person. Thus a contract to will and might be enforced after the testator's death by a proceeding in equity, just as specific performance might be had of a contract to deed property, but the contract must be fair and just in all its provisions and must, like all contracts, be supported by an adequate consideration. The contract must be sufficiently definite. Thus an agreement to will property to a person if he should make a success at farming it and if no unknown cause should turn up, is too vague, and equity will not enforce its performance.⁶⁸

49. **Mutual, and joint and mutual wills.**—There is no legal objection to uniting the wills of two persons in a single instrument if such instrument can be given effect, on the death of either, as the will of one.⁶⁹ A joint will contained in a single instrument is the will of each of the makers, and at the death of one may be probated as his will and be again

⁶⁷ *Swan v. Sayles*, 165 Mass. 177; *Packer v. Packer*, 179 Pa. St. 580, where a statutory provision passed subsequently to the execution of the will, dispensing with the requisite of attesting witnesses, was held not to apply to the prior executed will.

⁶⁸ *Dunshee v. Dunshee*, 255 Ill. 296, 301.

⁶⁹ *Frazier v. Patterson*, 243 Ill. 80.

probated at the death of the other as the will of the latter. Wills may be joint or mutual or both joint and mutual. A joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them. It is not necessarily either mutual or reciprocal. Mutual wills may be defined as the separate wills of two persons which are reciprocal in their provisions. A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other. These several classes of wills have some characteristics that distinguish them one from the other. A joint will which is not reciprocal is simply the individual personal will of each of the persons signing the same and is subject to the same rules that would apply if the wills were several. Mutual wills—that is, where two persons execute wills reciprocal in their provisions but separate instruments—may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such mutual will it is necessary to prove, by clear and satisfactory evidence, that such wills were executed in pursuance of a contract or a compact between the parties, and that each is the consideration of the other; and even in cases where mutual wills have been executed in pursuance of a compact or agreement between the parties, the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact

and revoke the will as to him. A joint and mutual will is revocable during the joint lives by either party, so far as relates to his own disposition, upon giving notice to the other, but it becomes irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other.⁷⁰

These wills were not favored under the early English law and both the common law and the ecclesiastical courts pronounced against them, but the better opinion now, both in England and in America, is as above stated. An example of a joint and mutual will would be as follows:

"Know all men by these presents, that we, Thomas R. James and Jane G. James, wife of said Thomas, being of sound, disposing mind and memory, and desirous of disposing of our worldly estate after our deaths, respectfully do make, publish, and declare this and none other to be our and each of our last will and testament, hereby revoking all and singular any other will or wills by us or either of us at any time made.

"First. It is our will that all our debts, joint and several, together with funeral expenses, be fully paid directly after our deaths, respectively.

"Second. We give, devise, and bequeath to each other, respectively, all such estate, right, title, and interest as we, respectively, hold, possess, and enjoy in and to the following described real estate, viz.: The north-west quarter of the north-east quarter, the north-east quarter of the north-west quarter, the south-west quarter of the north-east quarter, and the south-west quarter of the north-west quarter of section eleven (11); and twenty-nine and one-half acres

on the west side of the east half of said section 11, all in township 6, south, range 4, west of the fourth principal meridian, in Pike county, Illinois, being the same premises on the part of which we now reside, and all of which we own, not as tenants in common, but each his and her part in severalty, hereby giving and devising the land of the one who may die first to the survivor during his or her natural life.

“Third. After the decease of both, it is the intention of this testament that the whole of said real estate, or any other we may own at the time of the decease of the survivor of us, shall go to and be held and enjoyed by our daughter, Eva Frazier, for and during her natural life, and after her death it is our will that the whole of our said real estate, and every part and parcel thereof, with the remainder in fee simple, shall pass to and in such estate vest in the lawful issue and children of the body of the said Eva Frazier living at the time of her decease, by her present or any other husband.

T. R. JAMES, (Seal)
JANE G. JAMES. (Seal)”

50. **Alternative wills.**—“Alternative wills” applies to the situation where the testator executes two wills covering the same property, on the same or different dates, with the provision that one or the other shall operate as his last will and testament, depending upon a certain contingency. It is common for the testator to incorporate this provision in one of the wills—if the wills are of different dates, in the later one of the two—or in a codicil executed subsequent to the execution of the two wills. The contingency may depend upon some natural event, or it may depend upon the will or wish of some per-

son. Thus, in one case, a testator made two wills of different dates. Then he made a codicil in which he provided that if he should die before a certain date, the former of the two wills should operate as his last will and testament, otherwise the latter. He died before the date and the former was declared his last will.⁷¹ In another case, the testator made a codicil in which he made some provisions altering his will, and provided that his wife should have the option, after his death, of adding the codicil to his will or not as she chose. It was held that unless the wife elected to include the codicil, it would not become part of the will and would not become effective.⁷²

51. **The rights of devisees under a valid will become vested property rights at the death of the testator.**—It is to be understood that the rights of devisees and legatees under a valid will become vested property rights at the time of the testator's death and cannot thereafter be subject to legislative control. Therefore any attempt by the legislature, through subsequent statutes, either to make a valid will invalid, or an invalid will valid, the testator having died before the passage of the statute, would be unconstitutional. That is, where a will is invalid under the law in force when the testator died, no subsequently passed statute can make it valid, and likewise, if the will is valid, no subsequent legislative act can destroy its validity.⁷³

⁷¹ *In Re Hamilton's Estate*, 74 Pa. St. 69.

⁷² *Goods of Smith*, L. R. 1 P. & D. 717 (Eng.).

⁷³ *People v. Powers*, 147 N. Y. 104; *Hartson v. Elden*, 50 N. J. Eq. 522; *Jones v. Robinson*, 17 Ohio St. 171; *Remington v. Metropolitan Sav. Bank*, 76 Md. 546.

But the death of the testator will not prevent the legislature from changing the laws governing the settlement of estates, though such laws apply to the estate of the deceased testator. Thus where the subsequent law gave the surviving executor power to sell lands mentioned in the will, the law was held valid.⁷⁴

⁷⁴ *Bredenburg v. Bardin*, 36 S. C. 197. See also *McGillis v. McGillis*, 154 N. Y. 532.

CHAPTER V.

CAPACITIES OF TESTATORS AND BENEFICIARIES IN GENERAL.

52. **Who may make a will**—The present general rule.—As a general rule, any person of the required age, of sound mind, and under no constraint, may make a will of both real and personal property, by complying with the prescribed statutory formalities.

At the early common law, the requirements regarding capacity to make a will and a testament were widely divergent, because of the essential difference in the two classes of property, and the fact that testaments were construed by ecclesiastical or canon law, while wills were governed by statute and common law. Under modern legislation the capacity required to make a devise of realty and a bequest of personalty are the same, except in a few states, where some slight distinctions are made. Attention is called also to the rule that nuncupative wills apply only to personal property and not to real estate.

In discussing capacity to make a will, it is to be understood that the testator must be of the required capacity at the time of making the will. If he is not qualified at the time the will is executed, the fact that he subsequently becomes capacitated will not make the will valid unless it is republished, which is practically a remaking of it at the time he becomes qualified; but if he is qualified when the

will is made, his subsequent incapacity will not destroy the validity of the will.⁷⁵

This general rule as to who may make a will, will be discussed as regards: (1) disabilities of certain persons, and (2) disabilities as regards age.

53. Disabilities affecting certain persons.—Under this section will be discussed certain general disabilities which have prevailed affecting: (a) Criminals, (b) Aliens, and (c) Married women.

(a) *Criminals.* Under the ancient law, many persons who were regarded as offenders against municipal or religious laws, were classed as outlaws, and under the doctrine of attainder, they were prevented from inheriting or disposing of property and consequently could not make a valid will. The Constitution of the United States abolished attainder, or corruption of blood, so that the estate of a convicted felon is not forfeited, and unless the state statutes provide that a convict may not make a valid will, he may do so.⁷⁶

(b) *Aliens.* At common law an alien might make a will of personal property, but as his real property was held subject to be defeated at any time by the rights of the state or sovereignty in which he lived, his power to will such property was limited by this defeasible title.⁷⁷ But in many states of the Union, all restrictions upon the property rights of aliens

⁷⁵ *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Martin v. Thayer*, 37 W. Va. 38; *Osgood v. Breed*, 12 Mass. 525; *Etter v. Armstrong*, 46 Ind. 197; *Burkett v. Whittemore*, 36 S. C. 428.

⁷⁶ *Kenyon v. Saunders*, 18 R. I. 590.

⁷⁷ *Taylor v. Benham*, 5 How. 233 (U. S.); *Gray v. Kauffman*, 82 Tex. 65; *Phillips v. Moore*, 100 U. S. 208.

have been abolished; where they have not been abolished, the common law rule still prevails.⁷⁸

(c) *Married women.* Unmarried women are subject to the same rule as other persons, but married women, at common law, and to some extent under modern statutes, are subject to restrictions upon their testamentary powers.⁷⁹ As a general rule, however, the restrictions affect both husband and wife alike, attention being called to the rules referred to on pages 38 and 39 above.

Thus at common law a married woman was, with the exception hereafter noted, entirely incompetent to make a will of real estate, even with her husband's consent, or though her husband was the devisee.

As an exception to the above rule, a married woman could, at common law, dispose by will of real estate to which she had an equitable title, as by virtue of the conveyance of it to trustees for her sole and separate use.⁸⁰ And she could also dispose

⁷⁸ In Iowa aliens may hold 320 acres of land for a period of ten years. *Murenes v. Severtson*, 102 Ia. 322. The right of the states to hinder or forbid non-resident aliens from acquiring or holding real estate is limited by the treaties made by the United States with other nations, by which the citizens of each country are allowed to hold real property within the territory of the other. *Burrow v. Burrow*, 98 Ia. 400; *Adams v. Akerlund*, 168 Ill. 632; *Fixner's Succession*, 48 La. Ann. 552, 32 L. R. A. 177.

⁷⁹ Bacon, *Abr. Wills* (B), p. 481; *Osgood v. Breed*, 12 Mass. 525; *Bradish v. Gibbs*, 3 Johns. Ch. 523 (N. Y.); *Fitch v. Brainerd*, 2 Day 163 (Conn.). By the original Statute of Wills, 22 Hen. VIII, married women were apparently allowed to make wills, but this apparent power was promptly changed by the Stat., 34 Hen. VIII, chap. 5, which expressly excepted married women from those who might make a will.

⁸⁰ *Rich v. Cockell*, 9 Ves. Jr. 369 (Eng.); *Peacock v. Monk*, 2 Ves. 190 (Eng.). Where by contract made before or after marriage, upon a new consideration, a woman reserved power to dispose of her separate property by will, equity would enforce the contract, without the appointment of trustees. *Hall v. Waterhouse*, 5 Giff. 64 (Eng.); *Johnson v. Johnson*, 24 Ky. W. 628 (Ky.).

of real estate, conveyed to her use, by appointing beneficiaries, where a power authorizing such appointment was contained in the conveyance.⁸¹

As to personal property at the common law, a married woman could only make a will disposing of her personal property, in case her husband gave his consent to the particular will in question, with a full knowledge of its contents, and did not revoke his consent before the will was probated.⁸² The consent of the husband might be by parol before or after the wife's death, and might be express or implied. It must be to the very will in question with full knowledge of its contents, and could always be revoked by the husband before probate, but not afterwards.⁸³

As an exception to the above rule, a married woman might at common law make a testament without her husband's consent, disposing of personal property settled upon her to her sole and separate use, and this whether such property was derived from her husband or from a third person.⁸⁴

54. Same subject—Modern rule as to right of married woman to dispose of property by will.—In

⁸¹ *Hawkins v. Kemp*, 3 East 410 (Eng.); *Pride v. Bubb*, 41 L. J. Ch. 105; *Wagner v. Ellis*, 7 Pa. St. 411; *Dunn's Appeal*, 85 Pa. St. 94.

⁸² *Marston v. Norton*, 5 N. H. 205; *Anderson v. Miller*, 6 J. J. Marsh. 568 (Ky.). The reason for this rule being that, at common law, a wife really had no personal property unless by the consent of her husband. See in this connection 3 *Cyclopedia of Law*, §§ 319-322.

⁸³ *Kurtz v. Saylor*, 20 Pa. St. 205; *Brook v. Turner*, 2 Mod. 170 (Eng.); *Cutter v. Butler*, 25 N. H. 343. A married woman could also dispose of her personal property by will where her husband was incapacitated to act for himself, or had abjured the realm, was a convicted felon, or civilly dead. See *Page, Wills* (1st ed.), § 89.

⁸⁴ *Tucker v. Inman*, 4 M. & G. 1049 (Eng.); *Lee v. Bennett*, 31 Miss. 119.

In the United States, nearly all of the common law disabilities affecting married women in relation to their property have been removed by statutes. Thus in Arkansas, Connecticut, Delaware, Georgia, Indiana, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin, married women have substantially the same rights to dispose of property by will as unmarried women and men. In Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, Tennessee and Virginia, a married woman is unrestricted except as to her husband's right of curtesy. In California, Kansas and Massachusetts, married women may dispose of but half of their estate without the consent of their husbands. In Alabama, Arizona, California, Georgia, Kentucky, Louisiana and Washington, they may dispose of their statutory separate property by will.⁸⁵

State statutes are continually modifying and liberalizing the restrictions imposed upon married women and it is possible that new statutes have been passed in some of the states above mentioned doing away

⁸⁵ Where state statutes require the husband's consent to the wife's will, in her testament, this consent must usually be in writing. *Gregory v. Oates*, 22 Ky. 532; *Tyler v. Wheeler*, 160 Mass. 206. The right of a married woman to dispose of her property by will, thus depends upon statutes either giving her express power or removing the disabilities imposed by the common law; these statutes are so construed that only the form of will prescribed therein can be made by the married woman. Thus where the statute provided that she might make a will of her separate estate, when attested by witnesses, it was held that a holographic will without witnesses was invalid, though such a will would have been valid if made by a man or an unmarried woman. *Scott v. Harkness*, 59 Pac. Rep. 556 (Id.).

with more of the common law restrictions on the wife's right to dispose of her property.⁸⁶

55. Disabilities as regards age.—Nonage, or lack of capacity to make a will because of immature age, has been one of the disabilities common to all legal systems. Under the early English ecclesiastical law a will of personal property could be made by males at the age of fourteen, and by females at the age of twelve years and over. The Statute of Wills (32 Henry VIII) fixed the age for capacity to will real property at twenty-one years.⁸⁷ The Statute of 1 Vict. fixed the age of capacity at twenty-one years for both real and personal property.

In the majority of the United States a person must have reached the age of twenty-one years to have capacity to make a will as respects real or personal property.⁸⁸ In some of the states the age of capacity required is twenty-one years for real estate and eighteen years for personal property.⁸⁹ In a few states, the statutory age for making a will is eighteen years for both real and personal property.⁹⁰ There are some further variations to the

⁸⁶ See subject of Wills, American & English Encyclopedia of Law (2nd ed.).

⁸⁷ 2 Blackstone, Commentaries, p. 497.

⁸⁸ This is the rule in Arizona, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia and Wyoming.

⁸⁹ This is the rule in Alabama, New York, Rhode Island and Virginia.

⁹⁰ This is the rule in Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, South Dakota, Tennessee and Utah. In Wisconsin 21 years is required in all cases, except that a married woman is competent to make a will at the age of 18 years, as is the case in Washington, too.

above, such as in the case of Georgia, where fourteen years is the age of capacity. In Louisiana it is sixteen years and in Texas, nineteen years. In the case of Maryland, the age for disposing of real property is eighteen, but for personal property it is fourteen for males and twelve for females. Men in service offer further exceptions at times.

56. Same subject—Effect of statutory requirements as to age.—The state statutes fixing the age of capacity to make a will always control whenever this question arises. The statutes, therefore, should always be consulted in determining the age of capacity.

A person is deemed to have attained the age required on the last day of the year immediately preceding the prescribed year, that is, if the age of capacity is twenty-one, a person is of full age on the last day of his twentieth year.⁹¹

57. Who may take by will—The general rule.—As a general rule, any person may take property by will, including married women, infants and insane persons, so long as the gift in itself is not injurious.

58. Exceptions to the general rule.—Some exceptions to this general rule which were made at common law, and which prevail to some extent under modern statutes, are now to be mentioned. These exceptions include:

Aliens. At common law aliens could take a perfect title to personal property under a testament, and such property was only liable to be confiscated by the state in case of the party becoming an alien

⁹¹ Bacon, Abr. Wills (B), p. 481; Ex parte Holyland, 11 Ves. 11 (Eng.).

enemy.⁹² And at common law an alien could take a valid title to real property under a will, but his title was subject to be defeated at any time by the government, or state in which he lived, taking possession of the same. In many of the states, statutes have done away with the common law disabilities imposed upon aliens, and where this has been done they are as free to take and hold property as citizens are. In some states, as in Iowa and Illinois, aliens are either restricted in the amount of real estate they acquire or are limited in the time they may hold.⁹³

59. Same subject—Corporations.—Under the early English law a corporation might take real or personal property by will, but later under the Statute of Mortmain, and until the Statute of Wills of I Vict., corporations could not take real property by devise. This Statute of Mortmain has never prevailed in this country except in Pennsylvania and South Carolina for a while, so that, unless restrained by express provisions of the statutes, a corporation may take by will such real or personal property as it is authorized to hold in its charter.⁹⁴

⁹² *Harney v. Donohoe*, 97 Mo. 141; *Craig v. Leslie*, 3 Wheat. 563 (U. S.); Page, Wills (1st ed.), § 150.

⁹³ *Opel v. Shoup*, 100 Ia. 407; *Furenes v. Severtson*, 102 Ia. 322; *Jele v. Lemberger*, 163 Ill. 338; *Schultze v. Schultze*, 144 Ill. 290, 19 L. R. A. 90; *McGillis v. McGillis*, 154 N. Y. 532.

⁹⁴ *McGraw's Est.*, 111 N. Y. 66; *American Bible Soc. v. Marshall*, 15 Ohio St. 537. In South Carolina a statute similar to the Statute of Mortmain was in effect until 1872. *Am. Bible Soc. v. Noble*, 11 Rich. Eq. 156 (S. C.). In Maryland, by a constitutional provision, a religious corporation cannot take by devise unless the legislature sanctions it. *Church v. Smith*, 56 Md. 363. In a few states, the statutes provide that a corporation cannot hold real estate in excess of a named sum, and under this rule a devise to such a corporation in excess of the specified amount will be invalid as to the excess. *Starkweather v. Amer. Bible Society*, 72 Ill. 50; *Wood v. Hammond*, 16 R. I. 98.

In the case of devises to foreign corporations, the power to take is usually governed by the law of the state where the land lies, but it is held that if, in its home state, the corporation cannot take by devise, it cannot take in another state, though the laws of that state permit corporations organized there, to take.⁹⁵

An unincorporated company may, in its name, take personal property by will, but not real estate. But if the company becomes incorporated before the title is to vest, it may then take devises. So gifts to charities, or to corporations, to be thereafter organized, are good.⁹⁶

Public corporations, such as municipalities, the state, and the like, may be beneficiaries under a will.⁹⁷ It is a question decided both ways whether or not the United States may take property by devise.⁹⁸

60. Same subject—Other cases.—It is held, on grounds of public policy, that one who murders the testator for the purpose of securing the benefit of his will, cannot be permitted to take under it. And a devise to any unlawful society will not be allowed to take effect.⁹⁹

61. Same subject—Illegitimate children.—At common law the rule prevailed that while a parent or reputed parent to an illegitimate child could pro-

⁹⁵ *Starkweather v. Amer. Bible Soc.*, 72 Ill. 50; contra, *Amer. Bible Soc. v. Marshall*, 15 Ohio St. 537; *Thompson v. Swoope*, 24 Pa. St. 474.

⁹⁶ *Royer's Est.*, 123 Cal. 614.

⁹⁷ *Beurhaus v. City of Watertown*, 94 Wis. 617; *Quincy v. Attorney-General*, 160 Mass. 431; *Carder v. Fayette County*, 16 Ohio St. 353.

⁹⁸ *Dickinson v. U. S.*, 125 Mass. 311, holding that it can take; and *In re Fox's Estate*, 52 N. Y. 530, and *U. S. v. Fox*, 94 U. S. 315, holding that it cannot.

⁹⁹ *Riggs v. Palmer*, 115 N. Y. 506, 12 Amer. St. Rep. 819.

vide for it by will, others than the parents could not provide by will for future-born illegitimate children, and devises by such persons were held void, the reason being that such provisions might encourage illegitimacy.¹

By the modern rule the more humane policy of the civil law is followed rather than the austere one of the common law, in that all illegitimate children, whether born or to be born, may be provided for by will both by their reputed parents and others, and such bequests will be valid if the beneficiaries are properly described. A sufficient description is made when they are mentioned as the illegitimate children of a named mother.²

¹ In *Re Bolton*, 31 Ch. Div. 542 (Eng.); *Occleston v. Fullalove*, L. R. 9 Ch. 147 (Eng.).

² Page, *Wills* (1st ed.), § 156; *School's Will*, 100 Wis. 650; *Hayden v. Barrett*, 172 Mass. 472; *Hughes v. Knowlton*, 37 Conn. 429.

DIVISION II

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS

CHAPTER VI.

GENERAL PRINCIPLES.

52. **In general.**—The purpose here will be to indicate how to perfect a will. Incidentally, those questions affecting the life of a will will also be considered, such as revocation, republication and revival. The questions of the revocation, republication and revival of parts of wills and, in that connection, devised, void and adeemed legacies, will be discussed. In fact, under this general heading all matters that properly go to the structure, form, execution and continued existence of the will or any of its parts or provisions, are to be treated.

53. **A will is ambulatory.**—A will is unlike a deed in that a will may at any time be revoked by the testator. It is commonly said that a will is ambulatory until death. By that is meant that the will is operative and ineffective until death and takes effect at death only if it is then in existence.³ A deed, on the contrary, takes effect at once upon delivery and acceptance, and may not thereafter be revoked by the grantor. In short, where a person

³Stetson v. Stetson, 200 Ill. 601, LEADING ILLUSTRATIVE CASES.

makes a gift by deed he puts it out of his control to recall the gift, but where he makes it by will, he may recall it at any time before his death.

64. **Wills purely statutory.**—As was explained hereinbefore, the modern will was unknown at common law. It is true, there were wills of personal property recognized by the ecclesiastical courts, but a will of real estate was not recognized except in some localities, being inconsistent with and derogatory of the feudal ideas of land tenure. The subject of wills, therefore, must necessarily base its foundation upon some statute. In this country, the subject is governed by a statute in each individual state. These statutes are generally of the same nature, however, and attention shall therefore be called to three statutes which are appended here, under the designations by which they are hereinafter referred to.

There were some very old English statutes on this subject, but the first one that is of any value for the purpose of these illustrations is the one passed in England in A. D. 1677 in the twenty-ninth year of the reign of Charles II. This was known as part of the Statute of Frauds.

29 Car. II. c. 3 (1677).—V. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by the Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested

and subscribed in the presence of the said devisor or three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (1) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, that from henceforth any estate *pur autre vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy of assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent prac-

tices in setting up nuncupative wills, which have been the occasion of such perjury; (2) be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, that no will in

iting concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this Act, any soldier being in actual military service, any mariner or seaman being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the making of this Act.

XXIV. And it is hereby declared, that nothing in the Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this Act.

The second statute is one passed in England in the year A. D. 1837 during the reign of Queen Victoria. The material part is as follows:

7 Wm. IV. & 1 Vict. c. 26 (1837).—Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will"

shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a revenue upon His Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an Act passed

the thirty-second year of the reign of King Henry Eighth, intituled The Act of Wills, Wards, and Remainder Seisins, whereby a man may devise two parts of his land; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled The Bill concerning the Explanation of Wills; and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled An Act how Lands, Tenements, etc., may be disposed of by Will or otherwise, and concerning Wards and Remainder Seisins; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for Prevention of Frauds and Perjuries, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled An Act for Prevention of Frauds and Perjuries, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled An Act for the Amendment of the Law and the better Advancement of Justice, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled An Act for the Amendment of the Law, and better Advancement of Justice, as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled An Act to amend the Law concerning Com-

mon Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for Prevention of Frauds and Perjuries, as relates to estates *pur autre vie*; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America, except so far as relates to His Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled An Act for the avoiding and putting an End to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates; and also An Act passed in the fifty-fifth year of the reign of King George the Third, intituled An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will; shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie*, to which this Act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the

ture of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appoint-

ent made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he may have done before the making of this Act. * * *

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be ad-

mitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same

the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as

the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

The third statute is one in this country, the Illinois Statute of Wills, of which the following is here set forth:

Illinois Revised States. Chapter 3 Article III—Wills

§ 42. Every person of the age of eighteen years who is of sound mind and memory has power to devise and bequeath by will the real and personal estate which he has at the time of his death.

§ 43. Every will by which any real or personal estate is devised or bequeathed shall be reduced to writing, shall be signed by the testator or by some person in his presence and by his direction, and shall be attested in the presence of the testator by two or more credible witnesses.

§ 44. If any beneficial devise, legacy, or interest given in a will to a person attesting its execution to his spouse, the devise, legacy, or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided by this Article exclusive of that person; and he may be compelled to testify as if the devise, legacy, or interest had not been given. But the beneficiary is entitled to receive so much of the devise, legacy, or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established.

§ 45. If real or personal estate is charged with any debt by a will and the creditor whose debt is so secured attests the execution of the will, the creditor may testify to its execution.

§ 46. A will may be revoked only (a) by burning, cancelling, tearing, or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (b) by some other will declaring the revocation, (c) by a later will to the extent that it is inconsistent with the prior will, or (d) by an instrument in writing declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will. Marriage by the testator shall be deemed a revocation of any existing will executed by the testator prior to the date of the marriage.

§ 47. An addition to a will or an alteration, substitution, interlineation, or deletion of any part of a will which does not constitute a revocation of the will under this Article is of no effect, unless made by the testator or by some person in his presence by his direction and consent and unless the will is there-

after signed and attested in the manner prescribed by this Article for the execution of a will.

§ 50. When a surviving spouse of the testator renounces the will and the legacies to other persons are thereby diminished or increased in value, the probate court, upon settlement of the estate, shall abate from or add to the legacies in such a manner as to equalize proportionately the loss or advantage resulting therefrom.

§ 51. The real and personal estate of a testator that is not devised or bequeathed by his will descends and shall be distributed as intestate estate.

§ 52. The appointment of the debtor of the testator as executor of his will does not extinguish any debt due from the executor to the testator, unless the testator in the will expressly declares his intention to extinguish the debt and unless the estate of the testator without the collection of the debt due from the executor is sufficient to discharge all claims against the testator's estate.

It is desired that the student familiarize himself with these three statutes and note particularly the distinction between them, for reference will be made to them repeatedly. The first statute will be referred to as the "Statute of Frauds," the second as the "Wills Act," and the third as the "Illinois Statute of Wills." The statutes in use in the states may all, with slight variations, be said to have been modeled upon plans of which one or other of these statutes is an example.

CHAPTER VII.

THE EXECUTION OF WILLS.

Section A. Fraud, Undue Influence, and Mistake.

65. **Fraud.**—The general proposition contemplates that a will, the execution of which is obtained by fraud, is voidable; that is, it may be set aside against the one who has procured its execution by fraud, where someone interested in the estate of the testator, such as an heir or an executor or administrator, sues. The usual situation, however, is that a will obtained by fraud of some beneficiary, makes provisions for others, which other provisions were not obtained by fraud. What then shall be done? Shall the whole will be set aside? The rule is that only the provision in favor of the one who has procured the provision by the fraud shall be set aside.⁴

66. **What is fraud?**—Examples of fraud are legion. The most common form of fraud is where one paper has been obtruded on the testator for another which he intended to sign,⁵ as where the papers were so presented to him that he signed a paper beneath the one he thought he was signing.

Another form of fraud, a little more complicated than the above, is where the beneficiary under the

⁴ Appeal of Harrison, 48 Conn. 202.

⁵ Doe v. Allen, 8 T. R. 147 (Eng.).

will obtains a bequest or legacy by making a misrepresentation as to some material fact. Of course, the common form of active misrepresentation is governed by the general rule above suggested in cases of fraud. There is, however, a line of cases of which mention ought here to be made.

67. False identity or character.—Take the case of a man who, having one wife still living, married a second time. The second wife died in ignorance of this and at her death gave a legacy to her supposed husband. The question at once arises, Is such a legacy good? This is to be determined from the intention of the testatrix as manifested in her will. Thus, if she had merely said, “I give \$100 to John Brown,” such a legacy could possibly not be defeated by the mere showing that John Brown had imposed upon the testatrix by marrying her at a time when he had a former wife undivorced and still living. But if, on the other hand, the will reads, “I give \$100 to my husband, John Brown,” or “to John Brown, my husband,” and it appears that John Brown had married the testatrix while his former wife was living and undivorced, the legacy would be invalid. The reason is, that in the latter case the law will presume as against the party guilty of the fraud, that the testatrix gave the bequest because she thought she was giving to her husband and would not have given it to him had she known he was not legally her husband, whereas in the former nothing appears but that she might have given it to him, John, with knowledge of his deception.⁶

⁶ Kennell v. Abbott, 4 Ves. 802 (Eng.); Wilkinson v. Joughin, L. R. 2 Eq. 319 (Eng.).

68. **Where deceiver is innocent.**—Suppose that a woman with a child marries a man, leading him to believe she is a widow, but as a matter of fact is not a widow and has an undivorced husband living. The man dies in ignorance of this and in his will gives a bequest to his “step-daughter, Sarah.” It appears that the same rule does not apply here as in the other case, for here the legatee herself is innocent of any wrong. In such case it will be presumed, unless it is proved to the contrary, that the testator intended to give to that particular child and not to someone else that happened to be “stepchild.”⁷ In other words, the gift may be to one of two personalities: it may be (a) to that particular person known to the testator by the name, or it may be (b) to some person falling within the designation of the relationship mentioned in the will. Where the beneficiary was an intentional deceiver, the presumption is that the gift was intended for (b); where the beneficiary was an unintentional deceiver, the presumption is that the gift was intended for (a).

The whole question resolves itself into the best construction of the possible intention of the testator. Did he make the bequest because he wanted to provide for his stepchild, or did he make it because he had taken a fancy to this particular child, namely, the personality, and therefore wanted to remember her in his will? In one case, the testator's housekeeper misrepresented to him that a mulatto child he had borne, was his child. The testator remem-

⁷ *Wilkinson v. Joughin*, L. R. 2 Eq. 319 (Eng.); *Howell v. Troutman*, 53 C. 304.

bered the child in his will, and after the testator's death a proceeding was instituted to set aside this bequest.⁸ In that case the court said: "Supposing that he did believe the child was his, and that the mother of it told him so; there is not the slightest testimony to show that she ever asked him to make a will in favor of her and the child, or that she knew, before the will was made, that he intended to make one, or, afterwards, that he had made it. * * *

At most, it is said that she made him believe that he had begotten a child by her, which everybody but himself could see was a mulatto. Surely that alone cannot destroy a will which the mother is not shown to have had the slightest agency in procuring. * * *

The truth is that the old man, being childless by his wife, took a strange fancy to the child of his housekeeper, and, whether it was his own or not, he had a father's love for it, and our law imposes no prohibition upon a man to prevent him from bestowing his property upon the object of his affection."

69. **Undue influence.**—By far the more numerous cases, however, fall within the designation of undue influence. The precise definition of this term is difficult. The mere fact that the beneficiary persuaded the testator to make a provision for him, is not undue influence,⁹ nor is it evidence thereof that there appears great inequality in the distribution of the property in favor of certain beneficiaries.¹⁰ To

⁸ Howell v. Troutman, 53 N. C. 304.

⁹ Hall v. Hall, L. R. 1 P. & D. 481 (Eng.).

¹⁰ Storer v. Zimmerman, 28 Minn. 9.

amount to undue influence, there must be some act or power exerted by some person upon the testator, in such a way as to destroy his free agency.¹¹ The law considers that in order for a will truthfully to express the wishes of the testator, it must be the product of his free will. By that it is not meant that he might not be argued or even persuaded into entering some intention that he had originally formed, so long as after the argument or persuasion his mind is left free to act, and, if then he acts in accordance with the argument or persuasion, so long as he expresses his real wishes at the time of the making of the will.

70. **Matter of proof.**—Of course, it is at once apparent that the question whether in a given case the testator did act of his own will or not is one of fact to be determined by the jury or the court, as the case may be, and the presumption always is that the testator was a free agent in the making of the will. To rebut this presumption the contestant, being the one contesting the will, must overcome by a preponderance of the evidence.¹²

Just what evidence might amount to undue influence varies with a multitude of cases. In one case a second wife procured the husband to make a will cutting off the children by the former wife.¹³ The evidence disclosed that the husband was illiterate and a much weaker character than the wife, and that she everlastingly nagged and worried him to have all of his property to her children, disparaged

¹¹ Rollwagen v. Rollwagen, 63 N. Y. 504, 519.

¹² Downey v. Murphy, 1 Dev. & B. 82 (N. C.).

¹³ In *Re Tyner's Estate*, 97 Minn. 181, LEADING ILLUSTRATIVE CASES.

to him the children by the former wife, and in effect made it so miserable for him that he yielded for the sake of peace in the household and for his own peace of mind, and at a time when he needed quiet and rest. It was held that here was a case for the jury; that the contestant had so far made out a case of undue influence as to entitle him to have the jury decide whether or not there was undue influence.

Again the relation in which the parties stand to each other is often a material circumstance and may of itself, in some cases, be sufficient to raise a presumption of undue influence.¹⁴ Where a gift by deed or otherwise than by will, is made to one who stands in a fiduciary relation to the donor, that gift is presumed to have been obtained by undue influence. That is not true as to wills. However, the fact of a fiduciary relationship coupled with other circumstances makes a case of undue influence quicker than without the fiduciary relation.¹⁵ Thus, in one case it was said: "The facts that Joseph Yess, who occupied a fiduciary relation to his mother, was the active agent in having the will prepared; that he procured its preparation by his agent, who was a stranger to his mother; that he and his agent, alone, were present with her when it was drawn; that she was the dependent party and he the dominant party, and that he profited substantially by the will, are circumstances tending to show the exercise of undue influence." Again, the active agency of the beneficiary of a will in procuring it to be drawn, especially in

¹⁴ In *Re Smith's Will*, 95 N. Y. 516.

¹⁵ *Yess v. Yess*, 255 Ill. 414, 419.

the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance indicative of undue influence.¹⁶ However, improper relations between the testator and the beneficiary, alone, do not amount to it,¹⁷ though it will be more readily inferred where the beneficiary was the mistress than where she was the wife.¹⁸

For particular rules as to what evidence is admissible to prove undue influence, and what is not, reference should be had to the article on Evidence. It might not be inappropriate to make mention of the case here to illustrate the difficulty of the proof. The contestant was not permitted to prove the undue influence by evidence of statements of the testatrix made out of the presence of the defendant, while the defendant was permitted to exhibit in evidence letters that the contestant wrote to the testatrix during her life in which he begs for money and in which he confesses to having embezzled money. These letters were admitted to show that the testatrix may have been induced to cut off the contestant from enjoyment under her will because he was a spendthrift rather than that the defendant induced her to cut him off by falsely representing the contestant's character.¹⁹

71. Mistake.—Inasmuch as the law requires the will to be the testator's freely intended act, a will drawn by mistake is no more the act of the testator

¹⁶ *Donnan v. Donnan*, 256 Ill. 244, 251.

¹⁷ *Main v. Ryder*, 84 Pa. 217.

¹⁸ *Lord v. Read*, 254 Ill. 350, 356.

¹⁹ *Doyle v. Doyle*, 257 Ill. 229.

than a will obtained by undue influence. The question, however, always arises after the death of the testator, and the difficulty then is to determine if there was really a mistake. There is also always a further difficulty. Suppose that a will is incorrectly read over to the testator by the attorney at the time his signature is affixed to it. May the will be corrected after the testator's death to conform to the way in which he had intended it to be drawn? This latter situation may arise also under the subject of fraud, as will appear later.

It is conceivable that a mistake may occur in one of two ways: (1) Where the will was drawn by the attorney in a manner different from that in which the testator intended it to be drawn, and (2) where the testator intended the will to be as it was drawn, but was mistaken as to the legal effect of the will as thus drawn. In the first class, three situations are possible, to wit, (a) the testator may have had the will read over to him as it was and, not noting the mistake in it, signed it believing it was as he had directed it to be drawn, or (b) he may have signed the will without reading it or having it read over to him, taking the attorney's word for it that it was as ordered, or (c) the attorney may have incorrectly drawn the will and then misread it to the testator so as to make it appear that it was actually drawn as ordered.

72. Mistake as to contents of will.—Where in class (1) the situation is that of (a), it is clear that no alteration can be made after the testator's death.²⁰

²⁰ *Guardhouse v. Blackburn*, L. R. 1 P. D. 109 (Eng.); *Harter v. Harter*, L. R. 3 P. & D. 11 (Eng.).

to permit such would open the door to great possibilities of fraud. Where the situation is that of (b) some question exists among the authorities, whether it is admissible after the testator's death to show evidence of the mistake. It is argued on the one hand that to permit it would open up the same wide door to fraud, and on the other hand, to deny it would operate unjustly. Possibly the better rule is that evidence of the mistake is admissible for the purpose of striking out a part of the will, but that nothing can be substituted in place of the part thus stricken out.²¹ But where to strike out a word would increase the bequest to any of the beneficiaries in the will, it is equally as objectionable as adding words to a will, where it was claimed that the attorney made a mistake and added the word "real" to "all my estate," it would be improper to add "personal" hereto; likewise would it be objectionable to strike out "real," for either change would increase the bequest of the will.²² Where the situation is that of (c), the will cannot be said to be the will of the testator at all. The procedure in such case is not to change the will to conform to the intention of the testator, for that would be making a will without the formalities required by the statute; but the result of such a state of facts as in situation (c) is to render those parts of the will which are different from the way in which the will was read over to the testator, absolutely void, and if, then, the will cannot be divided so that those parts correctly read to the

²¹ *Goods of Boehm*, L. R. (1891), P. 247 (Eng.).

²² *Harter v. Harter*, L. R. 3 P. & D. 11 (Eng.).

testator can stand without the other, the whole will is void.²³

In resumé then, we have three situations under class (1). The first and second raise circumstances where, for all that appears, the testator may have changed his mind between the time of ordering the will drawn, and the time when he affixed his signature, so that no one can say from the mere fact that the will was by mistake of the attorney drawn contrary to the testator's instructions, that the testator did not ultimately intend it to be so drawn. In the third situation, however, there is a fraud practiced upon the testator so that the instrument he actually puts his name to, is not the instrument he intends to sign.

73. Mistake as to matters other than the contents of the will.—In the second class, the testator proceeds upon a mistake as to some fact outside the will, as where his attorney told him that certain words in the will had a certain effect in law, and the attorney's advice was bad,²⁴ or where the testator, intending to cancel a debt due from the one he had named executor in the will, was incorrectly advised by counsel that making the debtor executor, would operate to extinguish the debt.²⁵ In all the cases of this class, it seems the will must stand as drawn, mistake or no mistake.

74. Ambiguities.—In connection with mistakes in the making of wills, the subject of ambiguities requires consideration. This subject belongs more

²³ *Guardhouse v. Blackburn*, L. R. 1 P. D. 109 (Eng.).

²⁴ *Collins v. Elstone*, L. R. (1893), P. 1 (Eng.).

²⁵ *Brown v. Selwin*, Cas. temp. Talb. 240 (Eng.).

properly to the article on Evidence, but will receive a brief discussion here.

75. **Ambiguitas patens.**—It is commonly said that there are two kinds of ambiguities: (1) *ambiguitas patens*, which is an ambiguity apparent on the face of the will, and (2) *ambiguitas latens*, which is one not apparent on the face of the will. Of the former the rule is that no evidence may be introduced to clear up the ambiguity, for that would amount to making a will otherwise than in the mode indicated by statute.²⁶ Thus in one case the instrument recited “that it is my will that my daughter, Mary, and my son, Charles, and my daughter, Annie, shall be equally divided between all three.”²⁷ Manifestly here was an ambiguity on the very face of the will. The testator had omitted the property he wished to divide between the three. No evidence of what the testator had omitted, or what his intentions were, could be entertained.

76. **Ambiguitas latens.**—The other kind of ambiguity exists where the will on its face makes sense; that is, so far as the language and text of the will are concerned, it is intelligible, but when it comes to carrying out its provisions, it is found that the provisions of the will convey property the testator did not own or that they name some person as beneficiary who does not exist. The rule here, likewise, is that no evidence of intention is admissible to clear away the ambiguity.²⁸ However, this form of ambiguity may be evaded in another

²⁶ Kurtz v. Hibner, 55 Ill. 514.

²⁷ Karsten v. Karsten, 254 Ill. 480, LEADING ILLUSTRATIVE CASES.

²⁸ Miller v. Travers, 8 Bing. 244 (Eng.); Willard v. Darrah, 168 Mo. 660.

way. The law, appreciating the unjust operation of the strict rule, has conceived the following mode of correcting mistakes:

First, as to property that is misdescribed. Suppose the will gives the "N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24," etc. When it comes to executing the will it is found that the testator had no such property, but that he had the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24. The courts will execute this by permitting the letter "N" in the "N. $\frac{1}{2}$ " to be stricken out altogether, leaving the " $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24," if thereby the description fits property that the testator owned not otherwise disposed of by will. This is called the doctrine of *falsa demonstratio non nocet*, that is, a wrong description does not hurt the devise if, after striking out the erroneous part, enough remains to point out the property.²⁹ Some authorities go the length of requiring that, in order for the rule to work, the testator must refer to the property as his, thus: "My property in X state known and described as," etc. The reason for this is that, otherwise, for all that appears, the testator might have been trying to dispose of property he did not then own but expected to purchase afterwards and did not. The better rule, however, possibly is that if, after the striking out, enough remains to fit property the testator owned, it is sufficient. Thus, if the will gave "the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24," and instead the testator owned the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24, no amount of

²⁹ *Wiseman v. Green*, 127 N. C. 288; *Gano v. Gano*, 239 Ill. 539.

striking out would fit the property the testator really owned.³⁰

Second. The other situation is that where the beneficiary or legatee is misnamed. Here evidence may be introduced not of the intention of the testator, but that the testator was during his lifetime in the habit of calling a certain person by the name which appears in the will. This will identify that person as the legatee or beneficiary intended by the will.³¹ Thus where the testator gave property to "John, my friend," and it appeared he had no friend by name of John, but had one by name of James, it was proper to show that he always called this friend, "John."

Section B. Form of the Will.

777. **In general.**—The form of the will is governed strictly by statute. The student is, therefore, referred to the samples of statutes, in this connection, for distinctions between the rules under these three statutes will be drawn from time to time.

778. **Same subject—Signature.**—It is to be noted that each of these statutes, the Statute of Frauds, the Wills Act, and the Illinois Statutes of Wills, requires a signature. The Statute of Frauds provides that the will shall be in writing and "signed by the party devising the same." The Wills Act provides that it shall be signed at the foot or end thereof." The Statute of Wills provides "it shall be signed by the testator." In this connection it is to be observed that each statute provides that the signing may be

³⁰ *Graves v. Rose*, 246 Ill. 76.

³¹ *Willard v. Darrah*, 168 Mo. 660; *Coon v. McNelly*, 254 Ill. 39.

by some person other than the testator, but at his express direction and in his presence. That is merely a statement of the common law, for deeds, bonds and contracts may be thus signed, the theory being that the "other person" acts not as agent, but as an instrument, the testator using him just as he would a pen or a pencil, or any other instrument with which to write.³²

79. Same subject—What is signing?—The first question is, what is a signature? Must it be a writing in ink and with a pen; may it be a blot; may it be written with pencil? Possibly a proper definition would be "the introducing of foreign substance upon paper or parchment with the intent to make a signature." Thus, blood, ink, or lead may be used, and any mark is sufficient so long as made with the intention to add a signature.³³ However, there must be the intention to add the signature, and where the intention is merely to make a mark for a seal, it is not enough.³⁴ But where the intention to make a signature appears, any mark within the above definition is enough. Thus, a stamp was held sufficient.³⁵

80. Same subject—Where the signature should appear.—Where, then, should the signature in the will appear? Must it appear at the end of the will, or is it sufficient if it appears in the body somewhere? That depends entirely upon the statute under which the will is drawn. If under the Statute of Frauds or under the Statute of Wills, it is suffi-

³² *Riley v. Riley*, 36 Ala. 496.

³³ *Everhardt v. Everhardt*, 34 Fed. 82.

³⁴ *LeMayne v. Stanley*, 3 Lev. 1 (Eng.).

³⁵ *Jenkins v. Gaisford*, 3 Sw. & Tr. 93 (Eng.).

ent if the signing has been done somewhere in the body of the will, not necessarily at the foot.³⁶ Under the Wills Act, and statutes of that type, however, the signature must be at the foot of the will. The question then occurs, when is the signature at the foot of the will? It seems that the testator may leave a slight space blank between the written matter of the will and the name, but he may not leave a whole page blank between them.³⁷ In one case the testator signed his name at the end of the will, but the ninth, tenth, eleventh and twelfth clauses were written in the margin though above the signature. It was held that the signature was at the foot of the will within the meaning of the statute.³⁸ In another case the will was found in the form of four sheets pinned together, the sheet pinned on top being apparently the fourth sheet and bearing the attestation clause and the signature. The court held that this sheet was properly the end sheet, that the four sheets were loose at the time the will was drawn, and that the signature appeared at the foot.³⁹

§81. Incorporation by reference.—So much for the requisites of signing. The next essential inquiry is as to what are the contents of the will. Of course, no question could here arise if the contents of a will were confined to what appears written on the particular paper or instrument entitled "Last Will and Testament." But oftentimes the testator in his will refers to other papers, or future acts, as

³⁶ *LeMayne v. Stanley*, 3 Lev. 1 (Eng.).

³⁷ *Albright v. North*, 146 Cal. 455, LEADING ILLUSTRATIVE CASES.

³⁸ *In re Swire's Estate*, 225 Pa. 188.

³⁹ *In re Goods of Madden*, (1905) 2 Ir. 612 (Irish).

indicating the disposition of certain of his property, and the question here always is, does this other paper, or future act, thus referred to, become a part of the will?

At this point it might be well to mention what must already be apparent from the text of the statutes hereinbefore set out. A will in order to be good must conform strictly to the statute. Most statutes provide (a) that the will be in writing, (b) that it be signed by the testator, (c) that the testator acknowledge it to be his will, (d) that (b) and (c) be done in the presence of witnesses (two or more, according to the particular statute), who must be present at the same time, (e) that the witnesses must then sign (1) after the testator and (2) in the testator's presence, and (3) in some jurisdictions the witnesses must sign in the presence of each other.⁴⁰ When a testator in a duly executed will refers to some other paper, which paper is not duly executed (perhaps not attested), the objection at once arises that to permit him to do that would enable him to evade the statute requiring that a will be executed with all formalities. Is such objection sound?

82. Same subject—Under the Statute of Frauds.—It is to be noted that under the Statute of Frauds only wills of real estate were required to be witnessed by three or four credible witnesses. Under this act a situation arose like this: A, the owner of real estate, made a will duly executed and attested as provided by the Statute of Frauds, in which will he

⁴⁰ These various steps will be treated in detail hereinafter, and are mentioned in this connection only to lend force to the explanations of incorporation by reference.

provided that the property should go to B, subject, however, to the payment of all his debts and legacies. Afterwards he executed a simple writing, unattested, in which he directed that \$1,000 be paid to C. Then A died. The question arose, was C entitled to the \$1,000, or was his bequest invalid because the testator was trying to make the \$1,000 a charge upon his real estate without executing an instrument such as the statute provided? It was held that when he executed his will in which he expressly and in general terms made his real estate liable to all his debts and legacies, he at that time created a charge upon his real estate which was valid because an instrument properly executed; that, once created in a proper manner, the charge became perpetual, and that a subsequent writing, even though unattested, which merely directed how that charge already created should be applied, was not a disposition of real estate, but one of personal property.⁴¹ The subsequent simple writing, referring to personal property, was valid.

Where, on the other hand, a validly executed will contained a provision that the trustees under this will should pay off all such legacies as he, the testator, should thereafter charge upon the property, and the testator afterwards added a simple writing, not executed in conformity with the Statute of Wills so as to pass real estate, in which he charged the real estate with \$1,000 per year to be paid his wife, and died, this legacy to his wife was held invalid because the charge was not created until the time

of the unattested writing.⁴² The distinction may possibly be explained in another way. The test of whether the subsequent unattested writing is an attempt to create a charge upon real estate is to be determined by the inquiry, What is the sole object of the testator in making the unattested writing? If it is to create a legacy or to charge one on the real estate, then it is bad, but if it is merely a direction how to dispose of a legacy or charge already created, it is good.

83. **Same subject—Under the modern type of statute.**—Under the more modern types of wills statutes, such bequests are impossible for the reason that, under these statutes, wills of personal property as well as of real estate must be attested by two or more witnesses. However, a situation analogous to that set forth in the preceding section may arise. Suppose that a testator executed a will in all respects complying with the statute so as to pass property, and in his said will provided that certain property should go “to such persons as should be his partners in business at the time of his death,” or “to such persons as should be his servants”; suppose also that he gave another piece of property “to such a person as he should appoint.” The provision as to the partners or servants would be good, but the other provision would be bad.⁴³ The test is, What was the sole object? If it was to give a legacy or devise by some unattested act performed after the execution of the will for the purpose of giving a

⁴² *Rose v. Cunynghame*, 12 Ves. 29 (Eng.).

⁴³ *Stubbs v. Sargon*, 3 Myl. & C. 507 (Eng.).

acy, the provision is bad; but if the sole object of the after-performed act was not to give a legacy but to serve some other purpose, and the appointing of the legacy was merely incidental, it is good. Thus the act of entering into partnership could not be said to have for its sole object that of giving a legacy, nor could that be said of the act of appointing servants; but the act of designating a person to take a legacy can only have that for its object.

§4. Same subject—Reference to another but untested document.—Another situation often arises. Suppose that the testator in his will provides "that \$1,000 shall be paid to such persons and in such proportions as shall appear from a paper which will be found with my will." At the death of the testator a paper unattested and unsigned is found with the will, bearing a date one year subsequent to the date of the execution of the will. Such provision would be ineffectual to pass the \$1,000, for if it could do so, that would enable one to evade the wills law and to bequeath property by a simple memorandum which could change from time to time, or which others besides the testator might change. Suppose now that the paper thus referred to in the will is dated the day before the will, and it can be proved that at the time the will was executed, the paper therein referred to was already in existence. Even this does not admit it as part of the will or make it a valid testamentary provision. The question then occurs, can such a paper, referred to in a will, ever operate as a valid provision of the will? The answer must be in the affirmative if certain rules be observed.

1. The will must refer to the document in such terms that it can be identified.

2. The will must refer to the document as existing.

3. The document must actually have been in existence at the time the will was executed.

First, the will must refer to the document in such a manner that there is no doubt of the instrument intended. In one case⁴⁴ the testatrix made an instrument which she styled her last will and testament, but which was not executed in form as required by statute. Later she drew up a codicil which she styled, "This is a codicil to my last will and testament," and this codicil she executed properly. It was held that the paper before made and styled her last will and testament was thereby validated, as the codicil sufficiently described it. Secondly, the will or codicil must refer to the document as existing, as, if it does not do that, the paper will not be incorporated, even if as a matter of fact it is in existence.⁴⁵ Thirdly, the document must, as a matter of fact, have been in existence at the time of the execution of the will or codicil, for, if it was not, even though the will referred to it as then existing, it would not be incorporated.⁴⁶ Now suppose that the testator refers to notes signed by him in favor of those whom he wishes to make beneficiaries of his will, as where he provides that "any note or notes signed by me in favor of any person or persons and made payable by the terms thereof

⁴⁴ *Allen v. Maddock*, 11 Moo. P. C. Cas. 427 (Eng.).

⁴⁵ *Bryan's Appeal*, 77 Conn. 240, LEADING ILLUSTRATIVE CASES.

⁴⁶ *Goods of Truro*, L. R. 1 P. & D. 201 (Eng.).

er my decease, be recognized and treated as best interests in behalf of the payees therein respectively designated. * * * I have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries." Such a provision, it is to be noted, describes the papers sufficiently, and refers to some of them at least as existing, and all that is necessary is to prove that those notes actually presented for probate, were, as a matter of fact, in existence.⁴⁷

Another point must not be overlooked before passing by this particular subject. Suppose that a will is made, duly executed, referring to a document as then existing and sufficiently describing it, but that the provisions made and stated in this document cannot operate because, as a matter of fact, the document was not at the time in existence. Suppose that after the document did come into existence a codicil to the will was properly executed. As will appear from what follows, such codicil would act to republish the will and make it speak from the date of the codicil, and speaking from the date of the codicil the will would refer to a paper as existing which was actually existing, and the paper would therefore be incorporated into the will.⁴⁸ On the other hand, if the will does not refer to the paper then existing, a codicil merely republishing the will does not incorporate the paper, unless the codicil supplies the missing point, that is, unless the codicil contains a recital that the paper is existing.⁴⁹

⁴⁷ *Keeler v. Merchants' Trust Co.*, 253 Ill. 528.

⁴⁸ *Goods of Truro*, L. R. 1 P. & D. 201 (Eng.).

⁴⁹ *Goods of Smart*, L. R. (1902), P. D. 238 (Eng.).

85. **Same subject—Advancements.**—There is one exception to the rule, and that is in cases where the testator provides that advances are to be deducted from the shares of the beneficiaries, and refers to a paper as setting forth the amounts thereof. Such paper will be admitted in probate, not as a will or part of a will, but as part of the testator's accounts, for it is the theory of the law that gifts to beneficiaries during life may be deducted from the bequests where that appears to be the intention, and shall be where they are children of the testator unless a contrary intention is shown. Therefore, such paper would indicate what amounts should be deducted from the various legacies unless the legatee proved that he had not received the advances.⁵⁰

86. **Attestation—Competency of witnesses.**—The next question relates to the attestation of the will. The competency of the attesting witnesses will first be discussed, the number being governed strictly by and varying with the particular statute under which the will is drawn. As a general rule it might be stated that any person may be an attesting witness to a will who has no beneficial interest in the will. Suppose then that one had a beneficial interest in the will; that is, suppose he was a legatee, and then served as one of the attesting witnesses. At common law, if there were not sufficient attesting witnesses without him to conform to the number required by the law, the will would be void.⁵¹ Under modern statutes the will is not void, but the attest-

⁵⁰ Moore's Case, 61 N. J. Eq. 616.

⁵¹ Holdfast v. Dowsing, 2 Str. 1253 (Eng.).

witness is not permitted to take anything under the will. Suppose, now, that the wife or husband or one of the attesting witnesses received a bequest under the will. Inasmuch as, at common law, husband and wife were considered one, this at common law rendered the will void equally as if the attesting witness himself received the legacy under the will.⁵² Even under modern statutes, this latter objection has not, in all cases, been overcome. Thus where the statute provided that "all beneficial devises, legacies and gifts, made or given in a will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same," the will was not void, as it was at common law, because an attesting witness was a beneficiary, but the particular bequest, devise or legacy of the attesting witness was void unless there were sufficient witnesses otherwise, and the will otherwise was good. However, if the bequest, devise or legacy happened to have been given to the husband or wife of the attesting witness, the whole will was void just as at common law and the statute did not apply.⁵³ Many statutes have remedied this, however, and specially provide that where the gift is to the husband or wife of an attesting witness, the gift only and not the whole will shall be void.⁵⁴

At common law, one who committed an infamous crime could not testify, but if he became a witness

⁵² *Holdfast v. Dowsing*, 2 Str. 1253 (Eng.).

⁵³ *Sullivan v. Sullivan*, 106 Mass. 474; *Giddings v. Turgeon*, 58 Vt. 106; *Ther v. Spence*, 150 Ill. 253; *Hatfield v. Thorp*, 5 B. & Ald. 589 (Eng.); *Aslow v. Kimball*, 25 Me. 493.

⁵⁴ See Wills Act above, § 15; also *Woerner*, Amer. Law of Adm. (2nd ed.),

before committing the crime, while he could not testify, his signature could be proved, and the will thus established.⁵⁵ That was because he was not competent as a witness for any purpose. Therefore, even under the modern rule, such a person is not competent in those jurisdictions where he would be disqualified to act as witness in any capacity and in any kind of a suit, but in other jurisdictions where the commission of the crime does not disqualify him as a witness in lawsuits, he would be equally competent to attest a will.

It seems that under the modern law the father, son or other relative of a beneficiary is a competent witness. The husband or wife of the one making the will is not, but the father, son or daughter or a relative, is competent. The husband or wife of the testator is not competent even under modern law because even today, husband and wife are not able to testify for or against each other in ordinary lawsuits except in certain cases, and as attesting witness, a husband or wife would indirectly testify for or against the testator.⁵⁶

87. Same subject—Who takes a beneficial interest?—The question then arises, When does an attesting witness take a beneficial interest? Of course there is no doubt but that he does when he is a legatee or a devisee under the will. Does an executor come within the inhibition? At common law he was a good attesting witness, where he was not a resid-

⁵⁵ *Sears v. Dillingham*, 12 Mass. 358, *LEADING ILLUSTRATIVE CASES*.

⁵⁶ *Pease v. Allis*, 110 Mass. 157; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772, husband of testator's sister is competent.

ry legatee, and had no beneficial interest in the estate. Under the modern rule, an executor is a competent attesting witness, even though he is entitled to compensation for his services as such, though there are some authorities to the contrary. Where the executor is competent, his wife is also, but where he is incompetent, his wife is incompetent.⁵⁷ However, the executor like other attesting witnesses, still is incompetent where he is the recipient of a gift or devise under the will.

38. What is attestation?—The inquiry follows, what is meant by attestation? What is the operation of attesting? Generally speaking, the attesting witness attests to the fact that the testator has made a will. However, different statutes require different formalities of attestation. Thus, one statute might require that the will be attested; another may require that the signature only be attested. The general rule is that if the attesting witness sees the testator sign the instrument, that would be at once an acknowledgment of the testator that it was his will and also that it was his signature, and the attesting witness, then signing in the presence of the testator, would be attesting the will and the signature well. Under statutes of the type of the Statute of Frauds and the Illinois Statute of Wills, it is sufficient if the testator acknowledges to the witness before the witness signs, that the instrument is his will, even though the witness does not see the signature; and it is a good attestation under that type of statute if the attesting witness signs in the pres-

ence of the testator, even though no word is spoken.⁵⁸ This is on the theory that the acts of the parties amount to an implied acknowledgment by the testator that it is his will. In fact, under this type of statute it is held that the attesting witness need not even know that the instrument is a will.⁵⁹ Under statutes of the type of the wills act, however, the mere acknowledgment by the testator that it is his will, is not enough, even if express, so long as the attesting witnesses do not see the signature, because under this type of statute the signature must be attested.⁶⁰ But if the signature was visible, even if no express words were used acknowledging that that was the testator's signature, so long as the witness signed in his presence, the will is good.⁶¹

As to a will, some statutes require that the testator acknowledge "the making thereof" and in such cases the testator must either make the acknowledgment by word of mouth or give some sign of assent to the statement of the scrivener that he acknowledged it.⁶² Thus it appears much depends upon the phrasing of the particular statute.

89. Attestation must follow the act attested.—So under the Statute of Frauds and other acts of that particular type, the attestation is to the will, and if the will is acknowledged, it is immaterial whether the will be signed before or after the attesting wit-

⁵⁸ *White v. Trustees of Brit. Museum*, 6 Bing. 310 (Eng.).

⁵⁹ *In Re Clafin's Will*, 75 Vt. 19, LEADING ILLUSTRATIVE CASES.

⁶⁰ *Goods of Gunstan*, 7 P. D. 102 (Eng.).

⁶¹ *Daintree v. Fasulo*, 13 P. D. 102 (Eng.).

⁶² *Manner's Case*, 72 N. J. Eq. 854.

sign.⁶³ Under statutes of the type of the Wills Act, however, the attestation being of the signature, the testator must sign first.⁶⁴ Under all statutes, the attesting witnesses must all sign in the presence of each other, that is, all must be present at the same time.⁶⁵ As to what amounts to signing in each other's presence, it appears that they must mutually sign their names, for in one case one witness signed the will alone in the morning, and in the afternoon he appeared again with the other witness, when the other witness signed his name in the presence of both, and the first one completed the attestation to the letter "F" in his name and added the word "e". It was considered that the two witnesses had not both signed in each other's presence, for the striking of the cross to the "F" was not the signing, the signing having occurred before, out of the presence of the other. The will was held bad.⁶⁶

40. Attestation must be in the presence of the testator.—It is to be noted that wills statutes, as a rule, all require that the attestation be in the presence of the testator. The statement appears simple enough, but considerable difficulty has been experienced to know when an attestation occurs in the presence of the testator and when not. Suppose the testator is at one end of a large room and the witnesses at the other end, out of sight and earshot; suppose they attest in another room; or suppose that the testator is deaf, or blind, or both deaf and

⁶³ *Lacey v. Dobbs*, 63 N. J. Eq. 325.

⁶⁴ Same case as in note 63.

⁶⁵ *Moore v. King*, 3 Curt. 243 (Eng.).

⁶⁶ *Hindmarsh v. Charlton*, 8 H. L. C. 160 (Eng.).

blind. It is apparent the question is not so simple as at first it might have appeared.

Various rulings were accordingly had, from which the following is submitted as a statement of the rule to be followed in answering the difficulty. The rule resolves itself into two parts: First, no attestation is good no matter where or under what circumstances it is made, unless made within the zone of the particular testator's perception, that is, unless it is done within that area in which the particular testator may perceive, by any one of his senses, the action or the presence of the attesting witnesses. Second, if the attestation is in an adjoining room and not in the same room, then in addition to the above, the acts of attestation must also be in the line of vision of a normal individual in the situation of the testator. Thus, where the will is executed by the testator in the same room where the witnesses are, and they attest in that room, he being there, it is not essential to the validity of the attestation that he see them sign, so long as he is near enough to be able to perceive of their act from contiguity of presence, as by hearing, or feeling; namely, where they are in the zone of his perception.⁶⁷ In one case⁶⁸ the testator could not see the attesting witnesses sign on account of the curtains around the bed, which were drawn, but the attestation was sustained. In another case,⁶⁹ the testator becoming exhausted, the witnesses retired into the adjoining

⁶⁷ *Riggs v. Riggs*, 135 Mass. 238; *Ellis v. Flannigan*, 253 Ill. 397; *Cunningham v. Cunningham*, 80 Minn. 180, LEADING ILLUSTRATIVE CASES.

⁶⁸ *Newton v. Clark*, 2 Curt. 320 (Eng.).

⁶⁹ *Goods of Colman*, 3 Curt. 118 (Eng.).

in which communicated with the testator's room holding doors which were open. The attestation was done on a table so located that testator could possibly see it. The attestation was not good. In another case, however, the testatrix was blind and the acts of attesting occurred in an adjoining room. Because it appeared that the testatrix could not have seen had she been possessed of the sense of sight, the attestation was good; for it was done in the line of vision of a normal person in the testator's situation.⁷⁰ What, then, is meant by the line of vision of a normal person in the testator's situation? Imagine a testator in one room sitting facing a direction opposite to that of the door leading to the adjoining room where the attestation was done, so that, sitting in the position he had taken, the testator could not see the act of signing by the attesting witnesses. Had he turned his chair around so as to face in the opposite direction he might have seen the act. Would that be in the line of vision? The rule appears to be that it would not and the attestation would not be good.⁷¹ However, where he might have seen by merely turning his head, it would be good.⁷² One further point must be mentioned. By the line of vision, it is not required that the testator, a normal person in his situation, must actually see the attesting witnesses write, but he must see or must be able to see enough of the acts of the witnesses to know that they are writing, and

Goods of Piercy, 1 Rob. Ecc. 278 (Eng.).

Norton v. Bazett, Deane 259 (Eng.).

Graham v. Graham, 10 Ired. 219 (N. C.); *In Re Beggans' Will*, 68 N. J. 572, LEADING ILLUSTRATIVE CASES.

merely seeing their backs is not enough.⁷³ In a Minnesota case⁷⁴ it was held that it was sufficient if the testator could have seen the act of signing by the witnesses, by moving his position two or three feet. The will as signed by the witnesses was shown to the testator after the signing. The court argues that there is no sense in the distinction between moving the head and changing the position of the testator, where, as here, the testator was physically capable of stepping two or three feet forward.

91. **Testator's intention.**—The case of the will that was intended as a joke or a fake should be mentioned. According to the law of contracts, a contract entered into as a joke, where both parties were insincere at the time or must have been so, is no contract; a marriage so entered into, is invalid where no cohabitation follows the marriage. So a will executed as a joke or as a subterfuge or blind, will be set aside. Thus where it appeared from the evidence that the testator had told the scrivener that the will “was a fake, made for a purpose,” it must be taken to mean that what had been done was a sham. This rendered the will void, unless the testator subsequently re-acknowledged the will *animo testandi* (with intention of making a will).⁷⁵

⁷³ Graham v. Graham, 10 Ired. 219 (N. C.).

⁷⁴ Cunningham v. Cunningham, 80 Minn. 180, LEADING ILLUSTRATIVE CASES.

⁷⁵ Fleming v. Morrison, 187 Mass. 120.

CHAPTER VIII.

REVOCATION OF WILLS.

92. **By subsequent instrument.**—Just as the making of a will is governed by statute, so is the revocation of the will. Prior to the enactment of the Statute of Frauds in England, a will was revocable by parol.⁷⁶ The Statute of Frauds, however, contains a provision that no will of real estate shall be revoked except “by some other will or codicil in writing” duly attested, or “by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent.” Other statutes have substantially the same provisions. A will of personalty, under the Statute of Frauds, could be cancelled by an unattested writing.⁷⁷ It is to be noted that in the other statutes it requires an attested instrument to revoke it just as in case of real estate. It is to be noted, also that under the Statute of Frauds, a will of personalty might be revoked by words not in writing if the words are reduced to writing and proved by three witnesses. This is not true of modern statutes, for at the present day, revocation of wills of personalty is, as a general rule, attended with the same formality as revocation of wills of real estate.

⁷⁶ *Brook v. Warde*, Dyer 310b (Eng.).

⁷⁷ *Walcott v. Ochterlony*, 1 Curt. 580 (Eng.).

Now, then, as to when a will is revoked by some other will or codicil? It appears that merely making another will, though duly attested, is not sufficient. In order to operate as a revocation, the other will must either expressly revoke the prior will, or dispose of the same property attempted to be disposed of in the prior will. Otherwise, both would stand, as it is conceivable how there may be two wills made by the same testator provided they are not inconsistent with each other.⁷⁸ Even if two wills are in part inconsistent, they will still stand together as to those parts that are not inconsistent, and as to the parts contradictory, the prior one will stand revoked. And this is true notwithstanding the later will recites itself to be the "last will."⁷⁹

Whether a subsequent will in terms revokes the earlier will, though it is not inconsistent, is a question to be ascertained not from the form of the documents but from the intention of the testator as gathered from the body of the will.⁸⁰ In one case⁸¹ a testator died leaving three instruments, all duly executed and attested, and each of a different date. The earliest in time disposed of all the testator's property. The next in time was executed on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This instrument disposed only of a life insurance policy. The latest instrument was "a codicil to the last

⁷⁸ *Hitchins v. Basset*, 2 Salk. 592 (Eng.).

⁷⁹ *Freeman v. Freeman*, 5 DeG. M. & G. 704 (Eng.); *contra*, *Plenty v. West*, 17 Jur. 9 (Eng.).

⁸⁰ *Lemage v. Goodban*, L. R. 1 P. & D. 57 (Eng.).

⁸¹ *Simpson v. Foxon*, (1907) P. 54 (Eng.), **LEADING ILLUSTRATIVE CASES**.

will.” This gave certain bequests not inconsistent with those in the two preceding instruments. The question raised was whether the words of the printed form in instrument No. 2, “and only,” operated to revoke the earliest will. The court held that that had not been the testator’s intention, as to hold so would render the bulk of the estate intestate.

93. **By destruction.**—A will may also be revoked by destruction and cancellation. By destruction is meant burning, tearing or obliterating, or otherwise destroying the instrument. With reference to tearing, it appears that merely showing the will torn is not enough to make out a case of revocation by tearing. It is necessary also to show that the will was torn by the testator and that when he tore it he had the *animus revocandi*, that is, he had the intention of revoking the will by that act.⁸² The same is true of burning.

There is another mode, and that is obliteration, as where the testator strikes out the words of the will with a pen and ink, and here it seems that even a part of the will may be revoked by striking out, for the statutes provide that a will, or “any clause thereof,” may be so revoked,⁸³ and a clause may be a single word, so long as such omission leaves the rest intelligible.⁸⁴

This rule that any part of a will may be stricken out, even one word, if it leaves the rest of the will intelligible and if done *animo revocandi*, must be

⁸² *Bibb v. Thomas*, 2 W. Bl. 1043 (Eng.).

⁸³ *Larkins v. Larkins*, 3 B. & P. 16 (Eng.).

⁸⁴ *Swinton v. Bailey*, 4 App. Cas. 70 (Eng.).

tempered with the reservation that the prime object of striking out must be to revoke the particular bequest, and not to enlarge some other bequest. Thus, if the effect of striking out is to reduce the particular devise from an estate in fee simple to one for life, and the only way in which any other bequest might be increased would be by the balance of the estate falling into the residue and being thus distributed, it is permissible;⁸⁵ but where the effect is virtually to change the devise or bequest from one person to another, it is not good, as amounting to the making of a new will without the formalities required by the statute. Thus where a will originally gave property "To my sons A, B, C and D equally," it would be improper to cancel the names C and D, as that would directly increase the devises to A and B. But if the will read, "To my sons A and B $\frac{1}{2}$ and to my sons C and D $\frac{1}{2}$ " and the testator struck out the part "To my sons C and D $\frac{1}{2}$," that would be good, even though A and B would profit by having their shares increased by reason of the $\frac{1}{2}$ falling into the residue and then being divided as residue. But where the testator had sons A, B, C and D and drew a will consisting of two clauses only, as originally drawn, the first of which was a clause giving designated property to A and B and the second of which a residuary clause, giving all the residue of his estate to C and D, he could not strike out all of the first clause even though C and D would then take only by virtue of

⁸⁵ *Swinton v. Bailey*, 4 App. Cas. 70 (Eng.); *Bigelow v. Gillott*, 123 Mass. 102.

the residuary clause, because that would on its face be an evasion of the law and it would leave nothing but the residuary clause in the will.⁸⁶ Where, as in the last instance, the testator strikes out a word or words so as to directly increase another's share, the striking out will be ineffective, and the will stands as originally drawn.⁸⁷

94. **What constitutes destruction?**—As appears above, in order for a revocation to be accomplished by burning, tearing, or obliterating, there must be the *animus revocandi*, and this *animus revocandi* must continue until the act of destruction is complete. Thus in one case the testator had torn his will into bits with the intention of revoking it, but before he had thrown the bits of paper from him, and while he still had them in his hand, he was prevailed upon to desist.⁸⁸ It was held that he had not effected a revocation, as the *animus revocandi* ceased before the destruction was completed. But even where the *animus revocandi* continues, if there is not destruction at all, there can be no revocation. Thus where the testator had thrown a will upon the fire with the intention of burning it up, and a beneficiary under the will rescued it before any of the writing had been burned into, it was not revoked.⁸⁹ It seems that if the writing is torn into or burnt into, and the *animus* is there, that is enough, but if the corner or the margin only is destroyed, leaving the

⁸⁶ Miles' Appeal, 68 Conn. 237, LEADING ILLUSTRATIVE CASES.

⁸⁷ In re Kissam's Will, 59 Misc. Rep. 307 (N. Y.), LEADING ILLUSTRATIVE CASES.

⁸⁸ Doe v. Perkes, 3 B. & Ald. 489 (Eng.).

⁸⁹ Doe v. Harris, 6 A. & E. 209 (Eng.).

will proper intact, there is no revocation. There must be such injury with intent to revoke, as destroys the entirety of the will.

Suppose now that the name, signed at the foot of the will, alone is cut out by the testator, *animo revocandi*. Clearly under the Wills Act that would be such injury with intent to revoke, as destroys the entirety of the will, for it was seen that under that statute the name at the foot is an integral part of the will.⁹⁰ Is that sufficient under those statutes requiring merely that the testator sign? It has been shown that under such statutes the name may appear anywhere in the body of the will and if the testator writes the will in his own hand and starts it, "This is the last will and testament of John Jones," the signature at the foot is unnecessary under statutes of the type of the Statute of Frauds and the Illinois Statute of Wills. Of course if the signature at the end is the only place in the will where the testator has written his name, the result would be the same as under the Wills Act, but even when the testator has written his name in the body of the will in his own handwriting, if he then signed his name at the foot, he thereby made that a part of the will and cutting out that signature would be an injury destroying the entirety of the will. Thus where a will consisted of four sheets of paper, on the last sheet of which the testator had placed his name and followed it with a seal, even though the seal was unnecessary, the testator by placing it there made it part of his will, and cutting

⁹⁰ Hobbs v. Knight, 1 Curt. 768 (Eng.).

out the seal alone, *animo revocandi*, was a revocation.⁹¹

Suppose that a testator made a will and also a codicil to the will, and destroys the will, *animo revocandi*, and not the codicil. Does that also revoke the codicil? Under the Wills Act it did not, for by the express words of that statute, the codicil must be expressly and independently revoked, but under statutes of the style of the Statute of Frauds, the revocation of the will revoked also the writing which purported to be a codicil to that will.⁹² So it has been held that revocation of the codicil revoked also the will to which it was codicil.⁹³

95. **By cancellation.**—There is another mode of revoking a will, that of cancellation. This is accomplished by writing “cancelled” or words equivalent thereto on the will, and this, if accompanied by intention to revoke, operates as a revocation. Where the words are written across the face of the writing and the intention (*animus*) is there, no question can arise. The difficulty arises where the words of cancellation are written elsewhere than across the written part of the will. Suppose that the words are written on the same page, though not across the writing, but at the foot or in the margin. This would be sufficient.⁹⁴ Suppose, however, that the will consisted of four pages, the first of which had on it all the writing of the will, the second and third of which were blank, and the fourth of which was

⁹¹ Price v. Powell, 3 H. & N. 341 (Eng.).

⁹² Black v. Jobling, L. R. 1 P. & D. 685 (Eng.).

⁹³ In Re Brookman, 33 N. Y. Supp. 575.

⁹⁴ Warner v. Warner's Estate, 37 Vt. 356.

used as a mere wrapper leaf and had an indorsement by the attorney who had drawn it, and nothing more, and that on this fourth sheet, under the scrivener's indorsement, the testator wrote words of cancellation, *animo revocandi*. This was not sufficient to revoke.⁹⁵ The test may be, "Is the instrument, as a will, the same after the words of cancellation are written?" In the former case, it would not be. In the latter case, it would be as fully as if the envelope containing the will, merely, was so marked, or as if "cancelled" was marked on the back.

In this connection it should be remarked for purposes of emphasis, that this right to revoke, being statutory, must be performed in the mode pointed out by the statute. Thus a will not so revoked cannot be set aside on evidence that the testator wanted to revoke and was about to do so, but that he was prevented from doing so by a beneficiary under the will who used force or threats or made false representations and thus prevented the testator from accomplishing the revocation in the mode designated by law.⁹⁶

96. Dependent relative revocation.—The foregoing treatment of revocation dealt with a revocation by act of parties. Such a revocation is sometimes prevented by operation of law, because the testator when he made a revocation, was acting under a mistake of fact. The cases apparently resolve themselves into three situations:

⁹⁵ Ladd's Will, 60 Wis. 187, LEADING ILLUSTRATIVE CASES.

⁹⁶ Bohleber v. Rebstock, 255 Ill. 53, 56.

(1) Where the revocation is expressly conditioned by words in the revoking instrument.

(2) Where the revocation is expressly conditioned not in words but by interpretation, namely, where the act of revocation is part of a larger act which was intended to be carried out but was not.

(3) Where, in a court of equity, a revocation will be disregarded because induced solely by a reason which failed. It is to be observed that Rule (3) would not apply in an ejectment suit.

As to Rule (1): Where a testator, in revoking a will, expressly sets out in the revoking instrument as a reason for doing so that the beneficiaries are all dead, if it appears that he was mistaken, the revocation will not become effective.⁹⁷ It must appear, however, that the reason was the sole reason for the revocation. Thus in one case a testator made a will giving his property to charity and then later revoked this will and made a second in which he recited that "being advised that my devise to the charity was void as to real estate, though not as to personalty, and being desirous to continue it, and to make further provision for better support thereof, I give my personal estate to my executors upon trust, that if it cannot be laid out in land, it may be in securities for the same charity," giving his real estate to his nephew. It was insisted that the second will in so far as it revoked the first will was expressly conditioned by words, but the court held that it was not clear whether his fear that the devise of realty to charity was void, was his sole reason

⁹⁷ *Campbell v. French*, 3 Ves. Jr. 321 (Eng.).

for making the change; that from the words of the second will many causes may have contributed to his reason for changing the will; for example, he may have changed his mind about his nephew, or the estate may have grown in size in the interval between the making of the two wills. So the second will stood and the first was revoked.⁹⁸ It is to be noted that this rule applies only where the revocation is by another will or by codicil.

Rule (2) is self-explanatory. It is commonly invoked where a testator calls in his lawyer to change his will and then draws a line through his signature on the old will and makes alterations on the face, with the expressed understanding that a copy of the will as altered be made and that he then execute it before the required number of witnesses. Suppose then that the testator should die before the altered will is drawn up and executed. It is at once apparent that here the act of cancelling the old will was only part of the larger act, to wit: the drawing of the altered will, which was never carried out. Therefore the law holds that the old will shall stand as if uncanceled.⁹⁹ This situation must not be confused with that where the testator absolutely revokes his will, with the intention, it is true, of some time in the future drawing a new will. There the revocation of the old will is not prevented by the failure of the testator to make a new will, for it cannot be said that his revocation of the old will is part of and conditioned upon the making of

⁹⁸ *Atty. Gen'l v. Lloyd*, 1 Ves. Sr. 32 (Eng.).

⁹⁹ *Goods of Applebee*, 1 Hagg. Ecc. 143 (Eng.).

a new will. For all that appears, the testator wanted to cancel the old will at all events, whether he later made another will or not. Therefore if the indications are that the testator would prefer to die intestate rather than to have the old will stand, Rule (2) will not apply.

It is sometimes difficult to say when the testator's act of revoking his old will is part of a larger act that is not carried out, and when it is an independent act without reference to the later act of making a new will. In one case a testator a few days before his death gave instructions to a solicitor for a new will, and after sending for the old will, cut off the signature, and when the solicitor remonstrated, he stated that he meant to cancel the will as he was going to make a new will. The deceased, further, was alleged to have expressed himself to the effect that he understood that the cutting out of the signature from an old will was a necessary preliminary to making a new one. After he had thus mutilated the old will, the deceased made a statement that his sole reason for desiring to make a new will was his desire to increase a certain legacy. The instructions given to the solicitor, however, covered other alterations, and the solicitor prepared a draft of a new will, but the testator died before it could be executed.¹ The court submitted the case to the jury on two questions, substantially those above suggested, and the jury found that the act of revoking the old will was part of the larger act of making a new will. Since the new will was never made, the

¹ *Dixon v. Sol. to The Treasury*, (1905) P. 42 (Eng.).

old will was held good and the revocation did not become effective. It would appear from the last case cited that the question is one of fact for the jury.

As to Rule (3): The second rule deals with no mistake of fact but rather with mistake of intention. The first and third rules deal with mistakes of fact or of law, the only difference between the two being that in the first rule the mistake is set out in the revoking instrument, and in the third it is not set out in the revoking instrument but appears from the circumstances, or there is no revoking instrument. It becomes important, then, to examine some examples of this third rule, for it is under this third rule that the large majority of these dependent relative revocation cases fall. It appears that this rule is generally enforced in courts of equity as distinguished from courts of law, but doubtless is enforced also in courts of probate. It is to be noted that this rule applies where the act of revocation was induced solely by a reason which failed. The difficulty then is in determining not whether the reason failed, but whether the reason that failed was the sole reason. That, of course, depends upon the circumstances, and could not be better explained than by setting out some examples. Thus in one case a testator, having made a first will in which he wanted to make some slight alterations, made a second will revoking the first, and tore up the first, *animo revocandi*. The second will turned out to be invalid because not attested to in presence of the testator. It was held that the revocation of the first will was induced solely by a reason that

failed, to wit, the belief that the second will was valid, and so the revocation was not effective.²

Where, on the other hand, the testator made a first will giving bequests to certain religious charities, and afterwards revoked this will by a second will in which second will he gave bequests to a different religious charity altogether, the fact that the gift to the charity in the second will was void because that charity could not take, did not revive the first will.³ The distinction is, that in the former example the testator intended merely slight changes in his will, but wished the bequests in the original will the same in the main. Thus it was irresistible that his revocation of the first will was induced solely because he was making a second one. That cannot be said of the latter situation, where the will was changed completely. For all that appears in this latter case, the testator would have preferred to die without any will rather than to let the first will stand. In another case at the death of the testator the will was found with an erasure and the name of the sister of the testator written in place of the name that was erased. Of course, the sister could not take, for to permit her to take would be permitting a change of the will without complying with the statute as to due execution of a will. The question then arose, If the attempt to give the share to the sister by thus writing her name in after the execution of the will, failed, did the party whose

² *Onions v. Tyrer*, 2 Vern. 742 (Eng.).

³ *Powell v. Powell*, L. R. 1 P. & D. 209 (Eng.); *Quinn v. Butler*, L. R. Eq. 225 (Eng.).

name was erased take? The word “niece” had been there originally, and was the word erased. The erasure being an obliteration *animo revocandi*, constituted a revocation, and the niece could take only if it could be shown that this revocation was induced solely by a reason that failed. What reason then was it that failed? Clearly the belief that the sister would take. But was this the sole reason? Could it be said that the testator would have wished that no one took rather than that the niece took? As throwing light upon that, evidence was introduced that at the time the will was drawn with the word “niece” in it, the sister, mother of the niece, was ill and not expected to live, and that subsequently and before the death of the testator, she recovered. This was considered sufficient by the court to show that the belief that the bequest to the sister was good, was the sole reason, and the revocation was held to be inoperative.⁴

In another case a testator made a will and a codicil. On both the will and the codicil he afterward tried to change the bequests without the statutory re-execution, by pasting strips of paper over the parts he wished to change and writing other directions on the strips of paper. Thus in the will he pasted the strips over the names and wrote different names on the papers instead of those names thus obscured; in the codicil he pasted some strips over amounts and wrote different amounts on the strips instead of the amounts obscured. The court considered that this was an obliteration *animo revo-*

⁴ Goods of McCabe, L. R. 3 P. & D. 94 (Eng.).

candi and so a revocation, but the question was, Did this revocation become effective, or was it induced solely by a reason that failed? As to those strips covering names, the court held that it could not be said that the testator wanted the original names to get the legacies if the substituted names could not, and so refused to set aside the revocation. In the case of the paper pasted over the amounts, the court considered that here clearly the testator wanted the persons named to get something and that the sole reason of the revocation of the old amounts was the belief that the new amounts would be effective, and so the revocation in the codicil was set aside and the amounts under the paper were given.⁵ So also where the testatrix wanted to change her will because her sister died and thereupon drew her pen through various parts and added others, it could not be said that her reason for changing the will was based solely on the belief that the changes would be valid, any more than on the reason that the sister died, and so the revocation remained inoperative.⁶

97. Revocation by circumstances.—Hereinbefore have been considered acts of revocation which were within the control of the testator. There remain for consideration acts or happenings beyond the testator's control. This mode of revocation is accounted for on two different possible grounds. Both grounds require that there occur a total change in the situation of the testator's family. Once there

⁵ Goods of Horsford, L. R. 3 P. & D. 211 (Eng.).

⁶ In Re Knapen's Will, 75 Vt. 146, LEADING ILLUSTRATIVE CASES.

appears such total change the one ground (and the early one, now become obsolete), considers that a presumption of law is raised from this change that the testator would not want his will to stand and the will is therefore revoked unless this presumption is in some way rebutted.⁷ The other and modern ground holds that there is a tacit condition annexed to each will by the law that the will should not take effect where there is such a change.⁸ As to what is such a total change in the situation of the testator's family, it appears that, at common law, there must have been (1) a subsequent marriage by testator and (2) birth of children from that marriage, and either alone is not sufficient.⁹

What then is the significance of these two different theories or grounds above set out? The common law held that where the testator provided in his will for just such a contingency of a subsequent marriage and birth of children, the revocation would not become effective.¹⁰ The one ground considered that the presumption of intention that the will be revoked was rebutted by the evidence that the testator had provided in his will for this contingency. The other theory, however, held that where the testator had provided in his will for this contingency, the revocation did not take effect because it could not be said then that there was a total change in the situation of the testator's family.¹¹ That was a

⁷ *Lugg v. Lugg*, 2 Salk. 592 (Eng.).

⁸ *Kenebel v. Sraffton*, 2 East 530 (Eng.); *Marston v. Fox*, 8 A. & E. 14 (Eng.).

⁹ *Doe v. Barford*, 4 M. & S. 10 (Eng.).

¹⁰ *Brown v. Thompson*, 1 Eq. Cas. Ab. 413 (Eng.).

¹¹ *Kenebel v. Sraffton*, 2 East 530 (Eng.).

case where the testator, an unmarried man, bequeathed his property to a certain spinster with whom he had had familiar relations, and to any children he should have by her. Afterwards he married her and had children, and it was held that the will was not revoked. However, where the testator makes provision only for a certain woman and not for the children he might have by her, and afterward marries her and has children by her, the will is revoked,¹² and it appears that under the modern theory, evidence to the effect that he did not wish the will to be revoked notwithstanding the subsequent marriage and birth of children, is not sufficient to prevent revocation, so that to take the will out of the rule, provision must have been made for the prospective children as well as the prospective wife. It appears also that to take the case out of the operation of the rule, the provision must have been made by some act of the testator, and it is not sufficient that the child gets property of the testator by operation of law as where the will fails to cover all of the property and to part of the property there is an intestacy whereby the child gets the property as heir.¹³

98. Same subject—Under statutes.—Most statutes have changed the common law rule. Many provide that marriage alone, or birth of children alone, shall operate as an implied revocation of the will.¹⁴ Other statutes, like the one in Illinois, provide that where a child or children are born after the execu-

¹² *Marston v. Fox*, 8 A. & E. 14 (Eng.).

¹³ Same case as in note 12.

¹⁴ *Ingersoll v. Hopkins*, 170 Mass. 401; *Duryea v. Duryea*, 85 Ill. 41.

tion of the will, such child or children shall share equally with the others. As an example, the part of the Illinois Statutes, applicable, is referred to as follows:

Revised Statutes of Illinois, Chapter 3, Article III, § 48.—Unless provision is made in the will for a child of the testator born after the will is made or unless it appears by the will that it was the intention of the testator to disinherit the child, the child is entitled to receive the portion of the estate to which he would be entitled if the testator had died intestate, and all devises and legacies shall be abated proportionately therefor.

Where the statute provides that the will shall be revoked by marriage unless it shall appear from the will itself that it was made in contemplation of such marriage, it does not satisfy the statute to give in evidence a marriage contract in existence when the will was made, where the will did not refer to such contract.¹⁵ To permit it would have amounted to varying the will by parol evidence.

99. Same subject—Miscellaneous.—It seems that divorce is not such a change in the situation of the testator's family as to revoke a will. Thus a bequest to the testator's wife is not revoked when she subsequently obtains a divorce, if he does not himself revoke the bequest before his death.¹⁶ In one

¹⁵ Same cases as in note 14.

¹⁶ *Jones' Estate*, 211 Pa. 364.

state the birth of a child alone, even in absence of statutory provision to that effect, was held to be such change as to revoke the will,¹⁷ and in Illinois marriage alone is held to be revocation because in that state, if the husband dies without issue, and leaves no brothers and sisters, the wife takes all the real estate, so that marriage alone revokes a will.¹⁸

100. **Same subject—Married women.**—It should be noted here that at common law marriage alone, without birth of children, revoked the will of a woman.¹⁹ That was because a woman after marriage could not make a will, and could not even make an instrument the sole purpose of which was to revoke a will made prior to marriage. It would not be presumed, then, that she intended the will to remain where she could not help doing so merely because she was powerless to do otherwise. Modern statutes have, however, given a married woman power to make a will. What is the effect of such a statute upon the common law rule that marriage alone revokes a woman's will? It has been held that under such modern statutes, marriage of a woman alone does not revoke, but there must be marriage and birth of children in order to revoke.²⁰

¹⁷ *Negus v. Negus*, 46 Iowa 487.

¹⁸ *Tyler v. Tyler*, 19 Ill. 151.

¹⁹ *Durfee v. Risch*, 142 Mich. 504, LEADING ILLUSTRATIVE CASES.

²⁰ *In Re McLarney's Est.*, 153 N. Y. 416.

CHAPTER IX.

REPUBLICATION AND REVIVAL.

101. **Republication.**—What is meant by the term republication? Strictly speaking, it is the bringing the will down to date. When it is considered that under common law rules and in those states that still adhere to those rules, after-acquired real estate does not pass under a will, and when we consider, also, the rules relative to incorporation by reference, the question of whether a will has been republished or not becomes more or less important.

Republication occurs where the testator subsequently affirms or ratifies his will. Prior to the Statute of Frauds, this could be done orally even as to real estate.²¹ Even under the Statute of Frauds, republication might still be oral as to personal property. Under modern statutes it requires an instrument of equal formality to a will, as a duly executed codicil, to operate as a republication of the will.

102. **What does a codicil republish?**—Granting, then, that under modern statutes, it requires either a codicil or another will to republish a prior will, is it necessary for such codicil, or later will, to refer to the prior will by apt words so as to indicate on its face an intention to so republish the earlier will? Doubtless that would be necessary in case of a later will. A different rule seems to prevail, at least in

²¹ Beckford v. Parnecott, Cro. Eliz. 493 (Eng.).

This country, so far as a codicil is concerned. Thus it seems that a codicil to a prior will, which codicil is properly executed and attested, republishes and makes of the date of itself, the will to which it is a codicil, so as to pass real estate acquired in the interim between the execution of the prior will and that of the codicil, notwithstanding the codicil makes no mention of real estate or property.²² It seems, however, that a codicil does not bring a will down to date as regards the intention of the testator. Thus, it is the commonly accepted rule that a will is to be construed according to the intention of the testator, which intention is to be gathered only from the language of the will and the circumstances under which it was made, but that no expression of intention not contained in the will can be considered.²³ If the codicil brought the prior will down to date as to intention, it must permit the intention as it appeared from the language of the prior will, to be construed in connection with the circumstances under which the codicil or the later will was drawn. This it does not do. Thus, where a testator made a will giving his daughter \$700 and afterwards, during his lifetime, gave her the \$700 outright, and then died, she would not be permitted to claim \$700 under the will, for her legacy would be held satisfied by advancement as an ademption (a discussion of which follows later). Suppose then, that after he made this gift outright, he executed a codicil to his prior will saying nothing about the \$700 legacy or about any of

²² *Barnes v. Crow*, 4 Bro. C. C. 2 (Eng.).

²³ *Eyer v. Williamson*, 256 Ill. 540, 544.

the legacies. It might well be argued under the above rule that the codicil, by bringing the will down to the date of the codicil by republication, would rebut the presumption that this gift was in satisfaction of the legacy, i. e., the subsequent execution of the codicil would amount to re-enacting the legacy. Such result, however, was held to amount to bringing the intention in the prior will down to the date of the codicil, which the law says the codicil does not do in the absence of express words to that effect, and so the legacy was held satisfied despite the codicil.²⁴

What, then, as to the situation where a testator made a will and several codicils, and then, later, makes another codicil to his "Last Will and Testament"? Does that bring down to the date of such last codicil the will and all the other codicils to that will? The rule is that it brings down to date, with the will, all the other codicils which are themselves validly executed.²⁵ The reason for this is that a bad codicil is not included in the term "Last Will and Testament," but a good codicil is. Of course, where a testator has two wills that are not inconsistent, but can stand together, and then makes a codicil to "My Last Will and Testament," specifying the date of the prior of the two wills, the codicil would not republish also the other of the two wills.

103. **Revival.**—Suppose now, that a validly executed codicil refers to a will not executed and attested in conformity to the law. The old English

²⁴ *Izard v. Hurst*, Freem. C. C. 224 (Eng.).

²⁵ *Green v. Tribe*, 9 Ch. D. 231 (Eng.).

authorities hold that this operates to cure the defect in the will. Other authorities hold that a will effectively executed can never be republished by subsequent codicil, or short of rewriting and re-executing the whole will.²⁶ This case distinguishes, however, between the above situation and that where the will to which the codicil was published was invalid not because the will was not duly executed, but for some other reason, such as that after the will was executed, the testator married and had a child, and afterwards made the codicil. The case held that the codicil in this latter situation brought the will down to date of the codicil so as to prevent revocation by marriage and birth of the child. This is called the doctrine of revival and not of republication. It is commonly manifested in the situation where the testator makes two wills which are inconsistent so that the latter will supersedes the former; then, afterwards he cancels the second will in some appropriate mode. It is held that upon the cancellation of the latter will, the former will which had been superseded by the latter, is revived.²⁷ Suppose, now, that a testator made a will, then revoked it by codicil, and afterwards made a second codicil expressly reviving the will. Under statutes such as the Wills Act, such second codicil would be inoperative to revive a will once revoked.²⁸

Suppose, again, that a testator made a will, then married and had a child, then made a codicil expressly reviving the will, and then destroyed this

²⁶ In *Re Emmons' Will*, 110 App. Div. 701 (N. Y.).

²⁷ *Goodright v. Glazier*, 4 Burr. 2512 (Eng.).

²⁸ *Newton v. Newton*, 12 Ir. Ch. 118 (Irish).

codicil. The court inquired whether it was the testator's intention thereby to destroy also the revived will, and finding it was not, held that the effect of the codicil to revive the will once revoked by marriage and birth of child, was not lost by the mere subsequent destruction of the codicil without also an intention to revoke the revived will.²⁹ So, where a testator who made two wills, the latter revoking the former, finally made a codicil to the former, that revived the former and revoked the latter will.³⁰ Suppose, now, that a testator made two wills, the latter of which expressly revoked the former. Does the mere cancellation of the latter revive the former? It is to be noted that the situation here is different from that where the two wills are inconsistent and therefore the latter supersedes the former but does not expressly revoke it. The authorities on this situation are divided. One holds that such mere cancellation of the latter will does not revive the former will, unless an intention to so revive it is affirmatively shown, but that such intention may be shown by declarations made by the testator, subsequently, as to why he cancelled the latter will.³¹ Other authorities hold that since a will and therefore a codicil is ambulatory until the testator's death, therefore the last undestroyed, unobliterated and uncanceled instrument extant at the testator's death is his will. In the above situation, the former will would be revived on the cancellation of the latter.³²

²⁹ *James v. Shrimpton*, 1 P. D. 431 (Eng.).

³⁰ *Matter of Campbell*, 170 N. Y. 84.

³¹ *Pickens v. Davis*, 134 Mass. 252.

³² *Stetson v. Stetson*, 200 Ill. 601, LEADING ILLUSTRATIVE CASES.

DIVISION III

LAPSED, VOID, AND ADEEMED LEGACIES AND DEVISES

CHAPTER X.

LAPSED AND VOID LEGACIES AND DEVISES

104. **Distinction.**—What is the distinction between a lapsed legacy, or devise, and a void one? So far as the operation of the law on the rights of beneficiaries under a will is concerned, it will be seen there is but slight distinction. There is, however, a difference in definition of which it is desirable here to make mention. Inasmuch as a will is ambulatory until death; that is, inasmuch as the benefit conferred therein does not take effect until the death of the testator, the rule is that one mentioned as beneficiary in a will has no interest until the testator's death. Thus, if the beneficiary should die first, and then the testator die leaving the will unchanged, the heirs, or representatives, of the deceased beneficiary would not take the share he would have taken if he had lived longer than the testator, but instead, the share, or bequest, is held to lapse. Where the bequest then goes, it is the purpose here to discuss. The other situation occurs where the bequest cannot pass to a beneficiary even though he survives the testator, because the law says it is void.

That is a void bequest. Where such a bequest goes must be explained in connection with the similar treatment of the question of the lapsed bequest.

105. **As to legacies.**—Some little difference will be found in the treatment of this subject whether the gift is a legacy or a devise; that is, whether the subject matter is personalty or real estate. First will be considered the disposition of lapsed and void legacies. The rule is that where a legacy lapses, or where it is void, and the will has a clause disposing of the residue of the property not disposed of by the will proper, such lapsed or void legacy will fall into and swell the residuum and go as the residuary clause provides.³³ Of course, if there was no such clause, the legacy thus lapsed, or void, would be divided and disposed of just as if there was no will. It would go to the next of kin. Now, suppose that the residuary clause provided that the residuum should go to A, B, and C, and C died before the testator. It was there held that the residue could not fall into itself, and so C's share would go as in case of intestacy; i. e., it would go to the testator's next of kin.³⁴

106. **As to devises—Lapsed.**—The rule as to real estate was different. It was a rule handed down from the old feudal law that a person could not will after-acquired real property.³⁵ Therefore, at common law, where a devise lapsed after the will was made, it was looked upon just like after-acquired

³³ Wright v. Hall, Fort. 182 (Eng.).

³⁴ Bagwell v. Dry, 1 P. Wms. 700 (Eng.); Lloyd v. Lloyd, 4 Beav. 231 (Eng.).

³⁵ See § 46 for change by statute in England and in Illinois.

property, and so could not fall into the residuum. It went to the heirs (real estate went to the heirs and not to the next of kin).³⁶ Under modern statutes which make it possible to pass after-acquired property by will, the common law objection is obviated, and the real estate will fall into the residue just like the personalty.³⁷

107. **Same subject—Void.**—With reference to void devises, there is a conflict in the authorities. One line of authorities holds that the same rule should apply as in the case of lapsed devises, the argument being that where a devise is void it cannot be said that the testator intended it to pass as residue and therefore it must be just like after-acquired real estate.³⁸ Another line of authorities, however, holds that the testator must be held to have intended to pass by the will all the property he actually had at the time, and if a devise is void, it is as if it never was made, and so should fall into the residuum.³⁹ In the case cited the devisee was a church, and the devise was void because the church could not take. The former rule, possibly, is the most favored, but the latter, it is submitted, is based upon sounder argument.

108. **By statute.**—Statutes in some states have changed the rule so as to provide that where the testator gave a legacy or devise to a child, naming it, and that child died before the testator, instead of lapsing, such legacy or devise should go to the

³⁶ *Lessee of Ferguson v. Hedges*, 1 Harring. 524 (Del.).

³⁷ *Molineaux v. Raynolds*, 55 N. J. Eq. 187.

³⁸ *Greene v. Dennis*, 6 Conn. 293.

³⁹ *Lessee of Ferguson v. Hedges*, 1 Harring. 524 (Del.).

child's child. A section of a representative statute is appended:

Illinois Revised Statutes, Chapter 3, Article III, § 49.—When a devise or legacy is to a descendant of the testator who dies before the testator and there is no provision in the will for that contingency, the descendants of the devisee or legatee take per stirpes the estate so devised or bequeathed. Except as above provided, when a devise or legacy lapses by reason of the death of the devisee or legatee before the testator, and there is no provision in the will for that contingency, the estate so devised or bequeathed shall be included in and pass as part of the residue under the will, and if the devise or legacy is or becomes a part of the residue, the estate so devised or bequeathed shall pass to and be taken by the legatees or devisees, or those remaining, if any, of the residue in proportions and upon estates corresponding to their respective interests in the residue.

109. **Where the legacy or devise is to a class.**—Suppose that a testator gives a legacy or devise to “my children” without naming them. Under the law such is called a gift to a class, and the class is determined as of the time of the death of the testator; that is, those children living when the testator died, would constitute the class. Thus, if a testator in such a case had three children when he made his will, and one of those died before the testator, the share such child would have taken had he lived, would go neither to the residue nor to the next of kin, but the two surviving children would take it as belonging to the class of which they were the components.⁴⁰

⁴⁰ *Viner v. Francis*, 2 Cox 190 (Eng.).

CHAPTER XI.

ADEMPTION.

110. **Definition.**—By ademption it is meant that the testator, after giving a legacy or devise, has in some way, before his death, destroyed or disposed of the subject matter of the bequest so that on his death the bequest cannot be carried out because nothing remains with which to carry it out. Ademption is of three kinds: revocation of devise by conveyance, ademption of specific legacies, and ademption of portions.

111. **Revocation by conveyance.**—Where a testator wills a certain piece of real estate to a devisee, and afterwards and before the testator's death, he sells and conveys the real estate and pockets the proceeds, or even where it is taken by eminent domain in condemnation proceedings and the testator receives and uses the proceeds, it is held that the devise is revoked.⁴¹ Even if the testator puts the proceeds in the bank and then dies leaving the proceeds intact, the devisee would not get them because he was to have real estate and not the money. So, even where in his life the testator makes a contract to sell the land, the devise is revoked. Some jurisdictions have changed this by statute.⁴²

⁴¹ *Ametrano v. Downs*, 170 N. Y. 388.

⁴² Alabama, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Missouri, Nevada, New York, Ohio, Virginia, West Virginia. Woerner, *Am. Law Adm.* (2d ed.), § 53.)

112. Ademption of specific legacies.—Three possible examples might be suggested to explain the rule encountered under this head: a testator may bequeath (1) “a certain diamond ring given me by A,” or (2) “all my diamond rings that I now have in my vault,” or (3) “all my diamond rings.” Now, suppose that in example (1) the testator sold the ring given him by A. That operated to adeem the legacy so that the legatee of the ring would get nothing. Suppose that in example (2) the testator had rings in his vault at the time of making the will, then removed them from the vault subsequently and sold them, but bought other rings with the money and placed them in the vault where they remained until his death. There would here be an ademption and the substituted rings would not pass. But if he simply removed the rings from the vault and placed them in his desk where they remained until his death, the legatee would get them. Suppose in example (3) the testator had rings at the time of making the will, but sold them and used the money for other purposes, and afterwards purchased other diamond rings of different kinds and values from those he had before. The legacy would not be adeemed, but the legatee would get any diamond rings the testator might have at his death. Thus, in one case a testator bequeathed a certain number of shares of South Sea Stock. Afterwards he sold all of the stock he had, but later, before his death, bought more stock of the same kind. The legacy was not adeemed.⁴³ In the same case, the legisla-

⁴³ Partridge v. Partridge, Cas. temp. Talb. 226 (Eng.).

ure, by law, changed the stock into annuities, but this, being an act not of and out of the power of the testator, did not adeem the legacy. So, also, where property is given by a testator in his will to A in trust for B, the testator does not adeem the legacy by afterwards giving the trusteeship to C, so long as he does not interfere with the beneficial interest of B.⁴⁴

In another case the testator in his will gave a certain bond to a legatee. Before the testator's death the obligor on the bond paid it off and at the death of the testator the will was found unchanged, but no record was found of the particular money paid off on the bond. It was held that the legacy was adeemed.⁴⁵ If, on the other hand, the testator had accepted a new bond in place of the one he had when the will was made, we would come within an analogy to the annuities case above mentioned and there would have been no ademption. But the receipt of the money and the merging of the money with the rest of his funds by the testator, was tantamount to an outright sale of the bond by the testator. Even if he had used the proceeds of this bond to buy another similar bond, possibly the legacy would still have been adeemed.⁴⁶ In the case just cited, a testator in a will bequeathed what were known as long annuities, and before his death exchanged all the long annuities for short annuities of which he already had some, in which exchange he

⁴⁴ *Dingwell v. Askew*, 1 Cox 427 (Eng.); *In re Tillinghast*, 23 R. I. 121.

⁴⁵ *Fryer v. Morris*, 9 Ves. 360 (Eng.); *In re Bridle*, 4 C. P. C. 336 (Eng.).

⁴⁶ *Pattison v. Pattison*, 1 Myl. & K. 12 (Eng.).

made a profit, and then died with his will unchanged. It was held that the legacy of the long annuities was adeemed because the death of the testator left the estate without the specific thing he bequeathed as long annuities.

113. Ademption of portions—Satisfaction by advancement.—Suppose that a testator gives a certain bequest in his will, and afterwards and during his life, gives outright a sum of money or part of the bequest to that same beneficiary. What is the operation of such a subsequent gift *inter vivos* (during life) upon his right to receive the full amount of the bequest at the death of the testator? There are two rules governing the situation. One rule applies where the relationship between the testator and the beneficiary is that of parent and child, or foster parent and foster child, and the other where the relationship is more remote or even that of strangers. It appears that where the relationship is that of the former, it will be presumed that an advancement was intended and in such case when the beneficiary comes to claim his share at the death of the testator, there will be deducted therefrom the amount of what he received as a gift from the testator during the testator's life unless at the time of this gift *inter vivos* the testator expressed or evinced an intention that it was not to be an advancement.⁴⁷

However, it seems that where the bequest is of a particular article or a particular thing, a gift during life of a different thing does not amount to an

⁴⁷ *Izard v. Hurst*, Freem. C. C. 224 (Eng.); *Pym v. Lockyer*, 5 Myl. & Cr. 29 (Eng.).

advancement and will not be deducted from the bequest at the death of the testator. The theory is that the gift *inter vivos* is a satisfaction in whole or in part, and not a substitution, of the bequest in the will, and unless it can be so considered it will not be deducted.⁴⁸ Money, as against securities, of course, can be so treated. Thus, ordinarily, where the will gave one piece of land, a gift of a different piece during life will not constitute a satisfaction as to the devise in the will, but if the gift *inter vivos* was a part of the piece given in the will, that will be held a satisfaction *pro tanto* (for so much).⁴⁹ But where the beneficiary's interest in the will arises from the residuary estate, a gift *inter vivos* is never considered as satisfaction of such interest in the residue, unless the testator clearly intends it to be.⁵⁰

Where the relationship is more remote, however, or that of strangers, satisfaction is never presumed, but it must be clearly shown that a gift *inter vivos* was intended to be in satisfaction.⁵¹ The reason for this is that in case of a child it is considered that the gift in the will is out of a sense of parental duty to give a portion and therefore a subsequent gift *inter vivos* is considered merely a present payment of the portion fixed by the parent in his will, as due that child.

114. Ademption in case of special purpose.— When a legacy is given for a special purpose, such

⁴⁸ *Weston v. Johnson*, 48 Ind. 1.

⁴⁹ *Carmichael v. Lathrop*, 108 Mich. 473.

⁵⁰ Same case as in note 49.

⁵¹ *Weston v. Johnson*, 48 Ind. 1.

as to build a new church for a certain congregation, if the testator builds the church in his lifetime and then dies without changing his will, the legacy will be held to be adeemed and the congregation cannot collect upon the legacy after the testator's death. This rule is called ademption by fulfillment of a special purpose.⁵²

⁵² *Taylor v. Tolen*, 38 N. J. Eq. 91.

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

DIVISION I.

DECEDENTS' ESTATES

CHAPTER XII.

IN GENERAL.

115. **Probate.**—"Probate means the presenting of a will to a court for the purpose of having it approved and entered upon the records of the court. In the English ecclesiastical courts, which had exclusive jurisdiction of wills so far as they operated upon personal property, but no jurisdiction in respect to devises of real estate, there were two modes of obtaining probate, one in common form and the other in solemn form, or *per testes*. The probate was said to be in common form when the executor presented the will for probate in the absence of the parties and, without citing them, proceeded *ex parte* (without notice to possible contestants) with his proof; and it was said to be in solemn form when those in interest were cited to be present and full proof was made by the examination of witnesses. When a will was proved in common form, the court

might, at any time within 30 years after probate, of its own motion or at the instance of the next of kin or other person interested, require the executor to prove the will in solemn form.

“In the United States there is a general similarity of practice in administering the various statutory methods of probate and contest, but a considerable diversity in their technical features. In some of the states the proceeding in the probate court upon the original application for probate is entirely *ex parte*; but some proof of the will other than the oath of the executor, which was sufficient for the English probate in common form, is always required. In others, a notice and an opportunity for a contest are given, formal or informal, in the probate court. If the will is allowed or rejected without a contest, or after a contest not tried by jury, an appeal may usually be taken to an intermediate appellate court having a jury, where the case is tried *de novo*, and this remedy is sometimes exclusive. In others, after a decree of the probate court allowing the will, a re-trial may be had upon petition to that court to revoke the probate, or an action at law or a suit in chancery to contest the validity of the probated will may be brought in another court within the county. These methods of contest by appeal, by petition to revoke the probate, or by original action correspond in purpose and effect to the probate in solemn form of the English ecclesiastical courts.

“In a great majority of the United States the probate court has exclusive jurisdiction to admit to probate wills containing devises of real estate, and

such wills are probated and contested in the same manner as wills of personalty alone."⁵³

As to the effect of statutes of the type that provides that no will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court, it seems that a will still takes effect as of the date of the testator's death and that such a statute requires probate only as being necessary to prove title. Thus, where a trespass against property was committed before probate, a cause of action for the trespass arose at once, but the devisee could not sue upon it until after probate because he could not until then prove his title to the property.⁵⁴

116. When may a will be probated?—A question might here arise as to when a will should be probated. Under the law, in the absence of a will, the heirs are entitled to the real estate and the next of kin to the personalty. Suppose that one dies and his heirs take possession of his real estate and sell to bona fide purchasers who pay value, all under the belief that there was no will. Long afterward a will is found and this will gives real estate to devisees other than the heirs. What are the rights of these devisees? Doubtless they have the right to have the will established in probate. Having accomplished this they cannot proceed against those who have purchased the land from the heirs in good faith believing that there was no will, but they may proceed against the heirs to recover the value of the

⁵³ 6 Ency. of Pl. and Pr. 993-996.

⁵⁴ *Richards v. Pierce*, 44 Mich. 444, LEADING ILLUSTRATIVE CASES.

lands from them, unless their right can be said to be outlawed by some Statute of Limitations.⁵⁵

117. Administration.—Administration as a rule means the management and care of the personal property of one deceased. It has for its purpose the best conservation of the property for those entitled to it as beneficiaries, either the next of kin where the deceased died intestate, or the legatees, where the deceased left a will, and includes the collection of assets, the payment of debts and legacies, and distribution to the next of kin.⁵⁶ It is to be noted that this article is not confined to discussing the administration of decedents' estates, but under the general subject of Administration, there is considered also the handling of minors' estates, and to that end, generally, the subject of Guardian and Ward in Division II, hereinafter. The first treatment, however, is of decedents' estates.

118. Same subject—In general.—When an individual dies intestate, that is, without a will, an administrator is appointed by a court, to administer what assets deceased left. Where the individual dies testate, i. e., with a will, two situations might arise: 1. The will may name somebody as executor to administer the assets; 2. The will may omit to name anybody as executor. In the former situation, the executor will perform the duties of an administrator. In the latter situation, of course, an administrator must be appointed, there being no executor, and he is called administrator with the will annexed.

⁵⁵ *Haddock v. Boston & M. R. R. Co.*, 146 Mass. 155, 15 N. E. 495.

⁵⁶ 18 Cyc. 57.

Whether there be an executor as administrator, or an administrator with the will annexed, the rules governing their acts of administration are substantially the same. They are officers of the court and, as such, must follow the rules of court when acting in their capacities, and all their acts must be approved by the court. Their office is to represent the deceased, or rather his estate. As such representatives, their jurisdiction over the deceased's property extends only to personal estate and not to real estate, for at the death of the owner, intestate, only personal property belongs to the estate and real estate at once belongs to the heirs. Where the deceased leaves a will, this order of rights in the property he leaves is varied to suit the disposition provided in the will, and it is not uncommon for the testator to subject his real estate to payment of his debts. However, in absence of such provision, the general rule is that the personal property alone is answerable for the debts of the deceased. At common law, individuals could bind their real estate, even after death, by bonds executed during life, which bonds would be liabilities of the heirs to the extent that they inherited property from the decedents.⁵⁷ Statutes now, generally, contain provisions whereby, if the personal property proves insufficient to satisfy the deceased's debts, the real estate may be sold by petition to the court.

One distinction between the executor and the administrator is important to note, and that is the mode of appointment. The appointment of the for-

⁵⁷ *Hays v. Jackson*, 6 Mass. 149.

mer is simple, for he is pointed out by the will. He may decline the office, but if he accepts he is chargeable strictly with all the duties imposed upon the administrator. The appointment of an administrator is more or less difficult, for that depends strictly upon the statute governing it, and no little difficulty is sometimes encountered in determining who shall be the administrator.

In a number of states it is held that administration is unnecessary where there are no debts of the estate or the debts have all been paid and there are no minor heirs; the courts considering that when the only duty devolving on an administrator would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense. And the same is true where no administration has been applied for and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time limited for that purpose, or by the Statute of Limitations. But, if any of the heirs or distributees demand an administration, it must be had.⁵⁸

⁵⁸ *Brown v. Baxter*, 77 Kansas 97, LEADING ILLUSTRATIVE CASES; *Moore v. Brandenburg*, 248 Ill. 232, 236.

CHAPTER XIII.

ADMINISTRATION.

119. **Jurisdiction.**—In order that the administration of an estate may go on, the proper court must acquire proper jurisdiction by proper proceedings. The court having jurisdiction of the estate of an intestate is usually the court which would have had jurisdiction if he had died testate, that is, the court of probate jurisdiction for the county or district in which the deceased was domiciled at the time of his death. If he had no fixed residence at the time of his death, then the court of the county in which he died may take jurisdiction, while if the intestate died abroad, the court of any county in which he had property may administer, though there cannot be more than one grant of administration in the same state. Of several courts in the same state which might acquire jurisdiction, that one will be allowed exclusive control which first acts in the matter.⁵⁹ But in order that any court may acquire jurisdiction of the estate of a non-resident decedent, he must have left property within its territory.

In general, in order that any court may acquire jurisdiction, it is essential that proof be made of the death of the alleged intestate. When a person has been absent from his established home, and unheard

⁵⁹ *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369.

of by his friends and relatives for a period of seven years, it is presumed that he is dead, and the court may proceed upon that presumption. The same presumption may arise in less than seven years where the disappearance was accompanied by special circumstances, which of themselves raise a presumption of death.⁶⁰

Where several lives were lost in the same disaster there is no presumption from age or sex that anyone survived the others, but the fact of survivorship must be proved by the party asserting it. The presumption of death in any of these cases is only a *prima facie* one, however, and may be rebutted by proof that the party is not dead.

If the supposed intestate is not in fact dead, the majority of cases hold that all proceedings to settle his estate are void, but a few states hold that the proceedings will be sustained so far as may be necessary to protect the rights of innocent parties. In some of the states the matter has been regulated by statutes. These statutes usually declare the proceedings void, but they also generally protect the rights of those who have acquired interests under the proceedings.⁶¹

The general rule is that there is no jurisdiction to probate a will or to grant administration unless the person is physically dead so far as can be ascertained. Therefore no jurisdiction exists where a person is civilly dead, as where he has been sentenced

⁶⁰ *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

⁶¹ *Scott v. McNeal*, 154 U. S. 34, LEADING ILLUSTRATIVE CASES; *Thomas v. The People*, 107 Ill. 517; *Bolton v. Schriever*, 18 L. R. A. 242, 135 N. Y. 65. See *Day v. Floyd*, 130 Mass. 488.

to imprisonment for life, though some statutes expressly provide for jurisdiction in just such cases.⁶²

The proper court is usually set in motion by a petition from some person interested in the estate, setting forth the fact and nature of his interest; the fact of the death of the intestate; that he died intestate; that he left property within the jurisdiction of the court to be administered, stating its amount and the names and relationship of the persons who may be entitled to share in it. This petition is usually to be verified by the oath of the petitioner.

Upon filing the petition an order of hearing is made and a day set for such hearing, notice of which facts must be given to all parties interested, either by actual notice or by publication. Upon the hearing formal proofs of the allegations of the petition are made and then administration is granted.

A person not interested in the estate cannot set the court in motion by a petition for the appointment of an administrator.⁶³ But an interest as a creditor is sufficient. The statutes usually require that notice of the application shall be given to all parties who might be entitled to administer, and often to all who are beneficially interested in the estate. A failure to give the notice required by the statute will usually be sufficient cause for revoking letters of administration given without it. The persons cited to appear at the hearing, or any person

⁶² In *Re Zeph's Estate*, 50 Hun 523 (N. Y.), LEADING ILLUSTRATIVE CASES.

⁶³ *Johnson v. Johnson*, 15 R. I. 109, 23 Atl. 106, LEADING ILLUSTRATIVE CASES.

beneficially interested in the estate, may appear and contest the grant of administration to any particular applicant.

The granting of administration is a proceeding in rem, the same as the probating of a will, to which there are no formal parties. And an order made by the proper court, upon such notice as the statutes require, is usually binding upon all the world.

Statutes in many of the states prescribe the time within which administration shall be applied for, and administration granted after such time is usually held void. In some states no limitation is prescribed and administration may be had within a reasonable time. In a few states the amount of property which shall justify administration is prescribed by statute, but in most states no such provision is found, though there must usually be some assets to justify the grant of administration. Often the sole asset is the statutory cause of action by the administrator for death of intestate through negligence of others.

120. Who may claim appointment as administrator.—At common law the surviving husband had the right to administer upon the estate of his deceased wife, and the surviving wife had, usually, the similar right, either alone or with the next of kin, to administer upon the estate of her deceased husband.⁶⁴

This rule is preserved by the statutes in most of the states, and if there be no husband or wife surviving, then the right of administration usually passes to the next of kin. If no kindred exist com-

⁶⁴ Judge of Probate v. Chamberlain, 3 N. H. 129.

competent or willing to act, then a creditor or a stranger may be appointed.⁶⁵

The right of the widow to administer the estate of her husband is not an absolute one, and may be forfeited by her misconduct. She is usually held disqualified where by an antenuptial settlement she has waived all rights in her husband's personal property. The right of the husband at common law might be lost for the same reason. And the right of either is dependent upon the existence of a valid marriage at the time of the death, so that if the marriage was void, or had been dissolved by divorce, the right of administering fails.

After the right of the surviving husband or wife to administer, usually comes the right of the next of kin. Who they are, and in what degree related, is to be determined by the rules already given in a previous chapter. Where there are several, standing in the same degree of relationship, the court usually has power to select the most suitable to administer. In making this selection, certain rules usually govern. Thus a sole administration is preferred to a joint one; males are preferred to females; residents to non-residents; unmarried women to married women; relatives of the whole blood to those of half blood; those more interested in the estate to those less interested, and the like.

After the next of kin, the creditors have usually the right to administer. In selecting an administrator from the creditors, the statutes often give those with the largest claims the preference, but some-

⁶⁵ Rev. Stats. of Ohio, § 6005.

times those first applying have the preference. In many of the states those having the right to administer, who do not desire to do so in person, may nominate the administrator.

The person entitled to be appointed administrator or executor may renounce the right, and then, in case of a sole executor, an administrator with the will annexed must be appointed, while in the case of an intestate estate, the right to administer passes to the person next entitled to it.

Contracts to renounce the right to appointment as administrator are usually regarded as opposed to public policy and void, though in a few cases such contracts have been sustained. Under most modern statutes, the emoluments of the office furnish meagre consideration for any contract.

121. Qualification for the office of administrator or executor.—The person entitled to administration being determined, and being ready and willing to accept the trust, he must qualify for the office. This qualification consists in taking the oath and giving the bond required by the statute, and in an amount fixed by the court according to the value of the estate to be administered. The form of the bond is usually prescribed by statute, but in substance it is conditioned upon the faithful discharge of the duties of the office according to law. The amount of the penalty of the bond is generally left to be fixed by the court, and is ordinarily fixed at double the amount of the personal property.

Sureties are required in such numbers as the statutes specify. In determining the sufficiency of the

execution and form of the bond, the courts give it a liberal construction for the protection of those in whose behalf it was required.

In many of the states an executor is not required to give a bond, if the terms of the will exempt him from the necessity. But in other states the statutory requirement of a bond cannot be thus waived.

If for any reason additional bonds, new sureties, or increased penalties, become necessary for protecting the estate while in the hands of the administrator or executor, the court is authorized to require them to be furnished. The office cannot be regarded as properly filled until the qualifying bond has been duly given, but a grant of administration without it would, ordinarily, be voidable only and not void.

122. How the appointment is evidenced.—Upon the due qualification of the officer, letters of administration will be granted to him, if an administrator; or letters testamentary, if an executor.

Such letters granted by a court having jurisdiction for that purpose are, while unrevoked, conclusive evidence of the authority of such officer, and cannot be collaterally impeached or attacked, though they may be revoked, by the proper court, in a direct proceeding for that purpose, or upon appeal from the order awarding them.

A grant by a court without jurisdiction is void, and confers no right upon anyone. Letters granted without authority may be recalled by the court.

The letters thus granted do not of themselves constitute the authority of the officer. They are the evidence of his authority, but not the only evidence.

As evidence of his appointment and rights as such, they are, when granted by a court of competent jurisdiction, conclusive. But they are not admissible as proof of the death of the intestate, in actions between strangers.

123. What may be done by the officer before the letters are issued.—It was the theory of the common law that the executor derived his authority from the will itself, and that his title, therefore, vested at the testator's death. An administrator, on the contrary, derived his title from the grant of administration. In most of the states the common law rule as to executors is repudiated and the executor, like the administrator, derives his title and power from the law or the grant of authority by the proper tribunal. But in either case, for the protection of property and the enforcement of rights, the appointment of the executor or administrator, when made, relates back to the time of the death of the testator. Before the grant of letters, the person nominated as executor, or the person entitled to administration, has no authority further than is necessary to preserve and protect the property until the appointment can be made. But if letters are subsequently granted to such person, acts done by him before the grant which would have been lawful had he then been the legal officer, will be deemed ratified.⁶⁶

⁶⁶ *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54, *LEADING ILLUSTRATIVE CASES*; *Saxe v. Saxe*, 119 Wis. 557, 97 N. W. 187. "An executor, according to the common law doctrine, derives his office solely from the will by which he is appointed, and not from the probate, which is held to be only evidence of his right. In many, if not all of the states of the Union the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with

A person who, without authority, intermeddles with the estate of the decedent and assumes to act as executor or administrator, was, at common law, termed an executor "de son tort," that is, an executor "of his own wrong." Any act evincing a legal control over the goods of the estate would, if unexplained, make the person liable as such an executor. But mere acts of kindness or charity toward the property or estate of the decedent would not do so. An executor de son tort is said to have all the liabilities but none of the rights of a lawful representative. He is liable to be sued by the rightful representative, or by a creditor or a legatee; but he will usually be allowed credit for those acts which the lawful representative would have been obliged to perform.

If such an executor afterwards receives an official appointment, such of his acts as would have been invalid, if he had been the rightful officer, will be ratified. The rules just mentioned relating to this class of executors have been abrogated by statute in many of the states, though in several states they still remain in force.

Suppose, now, that a will was admitted to probate and the executor named therein qualified, and one who owed money to the deceased paid his debt to the executor so qualifying; that subsequently the will was declared void. Would the man who had paid the executor under the void will be protected, or would

certain statutory requirements and has received letters testamentary from a court of competent jurisdiction; but the nomination in the will cannot be disregarded by the court unless the person named is for some reason disqualified to act as executor."

he have to pay again? The rule appears to be that he would be protected even though the will was forged. This is because such payment would be made to the executor as an officer of the court.⁶⁷ So also one who purchased property in good faith from executors who had qualified under a will duly admitted to probate which turned out to be spurious, obtained good title.⁶⁸

Consider the obverse situation where administration has been granted by court and afterwards a will is found and offered for probate. Upon probate of the will an officer under the will, either the executor or an administrator with the will annexed (in case the will names no executor), would be appointed, and this would ipso facto revoke the administration granted before the existence of a will was discovered.⁶⁹

124. Removal of executor or administrator.—The court has the power to remove an executor or administrator for cause, as where he is insane,⁷⁰ or because of some unfitness or unfaithfulness.⁷¹ But such power of the court is never to be exercised merely for the convenience of the parties or because the beneficiaries may desire it. That is true particularly of executors whom the testator has appointed in his will, usually because of the testator's knowledge of their business capacity and his confidence in their integrity. When once they have accepted the

⁶⁷ *Allen v. Dundas*, 3 T. R. 125 (Eng.).

⁶⁸ *Steele v. Renn*, 50 Tex. 467.

⁶⁹ *In Re Mears' Estate*, 75 S. C. 482.

⁷⁰ *In Re Shaw's Estate*, (1905) P. D. 92 (Eng.).

⁷¹ *McIntyre v. Proctor*, 145 N. C. 288, 59 S. E. 39, 13 L. R. A. (N. S.) 438.

trust (they are at liberty to decline), they are not afterwards permitted to resign and voluntarily put aside its responsibilities.⁷²

125. The rights, duties, and liabilities of executors and administrators.—The first duty of the officer is to gather together and take into his possession such of the property of the deceased as passes to the representative. This property is termed the assets of the estate.

The real estate of the deceased passes usually to the heir or the devisee upon the death of the owner, and the personal representative has no interest in it.

In a number of states, by statute, the representative is entitled to the possession of the real estate during the period of administration for the purpose of settling the estate, but even under these statutes the real estate is usually deemed to descend at once to the heir, who may exercise all the rights of ownership over it until the personal representative becomes fit to exercise his possessory rights under the statute.

Except in such states as provide that the officer may possess himself of the real estate during administration, the personal representative is not bound or entitled to take possession of or to care for the real estate, unless it becomes necessary for the purpose of selling it to pay debts or legacies. If the personal estate is insufficient for this purpose, then the real estate becomes assets, by statute in all of the states.⁷³

⁷² McIntyre v. Proctor, 145 N. C. 288.

⁷³ Elstner v. Fife, 32 Ohio St. 358; Douglass' Lessee v. Massie, 16 Ohio 11; Ramsdall v. Craighill, 9 Ohio 198.

The testator may, by his will, confer upon the representative the power to sell, mortgage or otherwise deal with real estate, and powers so conferred are construed to be in addition to those conferred by the statutes.

Sales under such powers usually require no license or decree from the court. In all cases other than those in which such a power exists, the representative has no authority to sell the real estate, even for the payment of debts, without the order or license of the probate court. Where the testator confers a power to sell upon several, all of these persons must unite in its execution, and if one dies or refuses so to unite, the power fails, though this latter rule is changed by statutes in some states.⁷⁴

Discretionary powers conferred upon an executor by will, are usually personal in their nature and do not follow the office into the hands of his successor. That is, where A has been appointed executor by will with discretionary power nominated in the will, and he dies, his successor, B, will not have the powers which were conferred upon A.

Where such a power is conferred by the testator, and the object cannot be accomplished or is otherwise accomplished, the power ceases. If the testator directs the nature of the property to be changed, as to convert real property into personal property or vice versa, the courts of equity will regard that as done which is directed to be done, and the property so directed to be changed will be treated as though the change had actually taken place. This

⁷⁴ Rev. Stats. of Ohio, § 5980.

equitable rule is known as the doctrine of conversion, and applies wherever the testator has made a positive and unqualified direction to the executors or representatives to change property.⁷⁵

Chattels real go to the personal representative after the death of the owner. By chattels real are meant interests in land less than freeholds, as estates for years, estates from year to year, and estates for the life of a third person (*pur autre vie*) continuing after the death of the testator.

The interest of a mortgagee in mortgaged real estate is personal property and goes to the representative.

If the representative buy the property so mortgaged, in a foreclosure suit on the mortgage, the property is still regarded as personalty and as an asset. The mortgaged property itself or the equity of redemption, prior to a foreclosure, is regarded as real estate, and on the death of the mortgagor goes to his heirs.

126. Same subject—Personal property as assets.
—The chief portion of the deceased's estate, in fact, the sole portion over which the administrator or executor has the immediate control and of which he has the possession, is personal property. Real estate belongs to the heirs subject to the liability of being seized upon by the administrator under order of court and sold to pay debts where the personal property of the deceased proves insufficient for

⁷⁵ Page, Wills (1st ed.), § 699; *Ebey v. Adams*, 135 Ill. 80, 10 L. R. A. 62; *Johnson v. Conover*, 54 N. J. Eq. 333; *Collier v. Grimesey*, 36 Ohio St. 17; *Klotz's Est.*, 190 Pa. St. 152.

that purpose.⁷⁶ The decedent's estate consists of two kinds: 1. Goods and chattels, i. e., property actually in hand. 2. Rights in action, commonly called choses in action, such as debts.

127. Same subject—Choses in action.—Of the latter it is opportune to say a few words. In the language of an English case:

“The general rule of law is ‘*Actio personalis moritur cum persona*’ (an action for personal injuries dies with the person), under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskillfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of an executor or administrator to maintain an action in

⁷⁶ *People v. Brooks*, 123 Ill. 246, 248.

any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party so far as regards personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be, privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action."⁷⁷

Actions of contract for an injury to the estate never die with the testator. Anything that can be said to have come out of the corpus of the estate as distinguished from an injury to the body or person of the deceased, can be sued upon by the administrator. Thus where the deceased had been injured in a railroad accident and while laid up on account thereof incurred expenses for medical attention, the administrator could sue the R. R. Company and recover to this extent, and also for the injury sustained by the deceased's business because he was not able to attend to it while so laid up. But the

⁷⁷ Chamberlain v. Williamson, 2 M. & S. 408-414 (Eng.).

administrator could not recover damages for the deceased's pain and suffering as that had been strictly personal.⁷⁸ This has been changed by statute in many jurisdictions. So actions for fraud or deceit never survive, even though goods were sold to or bought from deceased by fraudulent representations, because the fraud was really an injury to the person.⁷⁹

128. Same subject—The inventory and appraisal.—Having taken upon himself the administration of the estate, the officer is required by statute in all the states to make and file, within a time prescribed by law, a complete inventory of the estate, setting forth in detail all the property within his possession or knowledge and capable of recovery by him, which is, or may be, assets of the estate.

Assets coming to his knowledge or possession are subsequently to be added or included in the supplementary inventory. In most of the states, upon the completion of the inventory, the chattels described are required to be appraised by appraisers, usually three in number and appointed by the court, who are required to set down the true value of each article.

A failure to make or return the inventory as required by law, is a breach of the officer's bond, and the statutes usually provide summary remedies for securing a compliance with the law and for obtaining property concealed or withheld by the officer.

The inventory and appraisal are not conclusive

⁷⁸ *Bradshaw v. Lancashire & Y. Ry.*, L. R. 10 C. P. 189 (Eng.), LEADING ILLUSTRATIVE CASES.

⁷⁹ *Cutting v. Tower*, 14 Gray 183 (Mass.).

either for or against the officer, but they are prima facie evidence of the amount of assets and of their value.

129. Same subject—Concerning the collection and possession of assets.—It is the right and duty of the officer to collect and take into his possession all the assets belonging to the estate which come to his knowledge, and his right during the settlement of the estate is superior to that of the heir or legatee.

He is bound to exercise good faith and reasonable prudence and diligence in commencing and prosecuting all actions which may be necessary to enable him to acquire possession of the property or to collect the debts due the decedent.

He is not bound to attempt the collection of bad debts, and he is not liable for their non-collection. But for debts or property lost by his negligence, he is liable.

Where the claim is a doubtful one, he may, and should, ask for indemnity or security from those urging its collection, but he must be prepared to show that it was not lost by his negligence.

The representative is not liable for a loss resulting from a mistake in law by which a debt remains uncollected, if he has acted in good faith and upon the advice of reputable counsel.

He is to use reasonable care and prudence in suing upon and enforcing those rights of action which survive to him and constitute part of the assets of the estate. And he must also prosecute or defend all actions commenced in the lifetime of the deceased

which survive, as well as seek to enforce those contracts and obligations which have been made with him since the death of the deceased.

In suing upon contracts made, or wrongs committed, during the lifetime of the deceased, the representative sues in his official capacity, but as to contracts made or wrongs done since the death of the deceased, he may usually sue either in his own name or in his official capacity, at his option.

To entitle the representative to sue upon the contracts of the deceased, it is not necessary that the contracts should refer to the representative, as the right will exist even though the contracts purport to be made with the deceased and his heirs or next of kin.

At common law, the representative might compromise or arbitrate a disputed claim or cause of action if he could show that his act was for the best interests of the estate. But if the arbitrators awarded less than might have been recovered by suit, or if he lost by such a compromise, the representative might be called upon to make up the loss. In most of the states, statutes exist by which the representative, with the consent of the court, may make a compromise without this personal liability.

In collecting the assets the representative has the right to enter upon the lands of the deceased to gather the crops or secure other personal property belonging to the assets of deceased.

As already shown, it was the rule at common law, that the executor or administrator could not sue upon strictly personal injuries that the deceased had

received in his lifetime, but any claim that arose out of an injury to the body of the estate as distinguished from an injury to the person of the deceased, the executor or administrator might sue upon. However, where a tenant made a covenant not to cut trees upon the premises, such a covenant, even if broken during the lifetime of the deceased, would not affect the personal estate but rather the real estate which went to the heir, so that the administrator would not be concerned.⁸⁰ A peculiar exception obtains in cases of fire insurance. The destruction of a building by fire directly affects part of the real estate, and therefore where the insured dies, the loss would logically be a loss to the heir and not to the administrator. However, it seems that contracts of fire insurance are looked upon as personal contracts of the insured, and on his death the executor or administrator may sue upon them. But he may not hold the recovered money as part of the estate and must surrender it to the heir.⁸¹

Suppose that the estate did not have sufficient assets to pay all its debts, so that creditors of the estate would receive only 50% of their claims, and that one of the creditors owed the estate money on another account. Could he set off against what he owed the estate, the full amount of his claim against the estate, or only 50%? The rule is that he might set off the full amount.⁸² However, he may do this only where he himself is the creditor and he may not buy in claims of other people against the estate

⁸⁰ *Raymond v. Fitch*, 2 C. M. & R. 588 (Eng.).

⁸¹ *Wyman v. Wyman*, 26 N. Y. 253.

⁸² *Helms v. Harclerode*, 65 Kan. 736.

for the purpose of setting them off against what he owes the estate.⁸³

⁸³ *Van Dusen v. Topeka Woolen Mill Co.*, 74 Kan. 437, 87 Pac. 74. In case of mortgages see Maitland, *Equity and Forms of Action at Common Law*. "Now the chief thing that we have to notice in this region is an old rule of equity about the rights of a creditor who has a security, but an insufficient security, for his debt. A. dies owing X. £2000, and his debt is secured by a mortgage of Blackacre. X. realizes his security. He sells Blackacre, but the sale produces only £1000. Well, of course, X. is still entitled to be paid another £1000, and if A.'s estate is sufficient for the payment of all his debts then X. will get that other £1000. But suppose that A.'s estate is insolvent; X. will certainly be entitled to something besides the £1000 that he got out of Blackacre. It would, I think, be natural to say that X.'s right is to prove against the testator's estate a debt of £1000, and take a dividend, whatever it may be, say five shillings in the pound, proportional to that debt of £1000; for £1000 is what is due to him after Blackacre has been sold. Now that was the rule to which the Court of Bankruptcy came in the administration of the insolvent estates of living persons. Its rule was this: The creditor with an insufficient security may do one of two things: He may abandon his security (abandon Blackacre) and prove for his whole debt (prove for £2000), or he may realize his security and prove for what still remains due to him after such realization. Thus in the case I have put he may pocket £1000, the price of Blackacre, and then claim a dividend on the other £1000 which still remains due to him. But the Court of Chancery in its administration of the estates of dead persons came to another rule, usually known as the rule in *Mason v. Bogg* (1837) 2 My. & Cr. 443. The mortgagee may realize his security, and may also prove against the general estate for the whole of his debt, provided always that he is not to get more than twenty shillings in the pound. Thus in our case X. might keep the £1000 that he gets from the sale of Blackacre, and then he may also prove against the general estate of the dead man for the whole £2000; but, of course, he is not to get in all more than the whole debt, the whole £2000 that is due to him. This rule may seem to you unjust, and it has seemed unjust to Parliament. It seems to favor the secured creditor unduly at the expense of unsecured creditors. However, you can see that there was a certain logic in it. The mortgagee has two distinct rights, the right in personam, the personal right against the debtor, and the real right, the right in Blackacre. Why should he not use both of these? Why should the fact that he has used one of them hamper him when he desires to make good the other? He sells Blackacre. Well and good; but the dead man owed him £2000. Why should he not prove against the dead man's estate for the whole of this debt? However, it is needless now to consider whether or no there was much justice in this reasoning; for a section of the Judicature act of 1875—section 10—declared in effect that in the administration of the estates of dead persons the bankruptcy rule was to prevail as between the secured and the unsecured creditors."

130. Same subject—Concerning the management of the estate.—The statutes require that the officer, in dealing with the assets of the estate, shall act in good faith, and shall exercise that degree of care, skill and diligence which men ordinarily bestow in the management of their own affairs. If he fails in this respect and loss results by reason of his failure, he will be personally liable for the amount of the loss.

He should keep the property and funds of the estate separate from his own funds. If he deposits funds of the estate in a bank in his own name, he thereby becomes liable for their loss, by failure of the bank, even though the bank was in good credit at the time of the deposit and he had no funds of his own there, and the officers of the bank knew that the funds deposited were trust funds.

But if the officer acts with reasonable prudence and deposits funds in the name of the estate, or in his official capacity, he will not be liable if the bank where they are deposited fails.

The officer should not use the funds of the estate in his own business or speculate with them on his own account. If he does so, it is a breach of his trust and he will be liable for the loss of the money, if the investment fails, and must account for all profits if it is successful. He will also be held liable for the highest rate of interest on the money, and the persons entitled may, at their option, take such rate of interest or the profits of the private undertaking.

As a rule, the representative should not invest,

or permanently deposit, if he can use the funds of the estate in paying current expenses and demands; but when he cannot do so, it is generally his duty to invest the money in interest-bearing securities, and for failure to do so within a reasonable time, he may be charged with interest.

In some states, the statutes specify the investments in which such funds may be laid out, but in the absence of a statute, the officer will be bound to exercise good faith and sound discretion. He may usually secure from the court an order as to the investment, which, when followed, will protect him from personal liability.

The officer should use reasonable diligence and prudence in preserving and protecting the property of the estate, and should care for growing crops, live stock, and the like, and secure policies of insurance, and dispose of perishable property with reasonable diligence so as to prevent loss.

The representative is appointed to close up and not to continue the business of the deceased. He has, therefore, no general authority to continue the trade or business in which the deceased was engaged, and if he does so, will be liable for the losses incurred and must account for all the profits.

But a reasonable discretion will be allowed him in choosing the time, place and circumstances under which the business or trade shall be wound up, so as to enable him to dispose of it to advantage.

Also the testator may, by his will, direct the continuance of his business by the executor for a limited time, and in such cases, the executor will incur

no personal liability while acting within the authority so conferred upon him by the testator.

Where the business is continued at the request of those interested in the estate, they cannot complain of the acts of the representative, nor insist that he be charged with losses.

The same general rule applies to the settlement of the interest of the deceased in a partnership. Unless otherwise specified in the statute, the death of one partner dissolves the partnership and the surviving partner takes the entire legal title to the assets, for the purpose of winding up the business as soon as practicable. When the partnership affairs are wound up, the interests of the deceased partner are to be turned over to his representative. The representative has no right to continue the partnership business, unless such a power is conferred by the will or granted by the consent of the parties interested in the estate.

Undertakings by the deceased to perform purely personal services cannot be performed by the representative, but contracts of a general nature which are binding upon the deceased may be performed by the representative, if there is a reasonable prospect of profit, though at common law, the representative incurred the risk of being liable for the losses.

For any act of waste, mismanagement or breach of duty, by which the estate suffers loss, the representative becomes personally liable. Such losses or injuries to the estate by the representative are technically called "devastavit," that is, a waste committed by the representative.

The title to the personal property vests in the representative for the purpose of paying the debts and legacies charged upon the estate, and he may sell such property, when necessary, for that purpose. And unless restrained by the statutes, he may sell without the license of the court, subject only to his general obligation to act in good faith and with reasonable prudence.

The statutes in some states provide for the license, or order of sale, from the probate court. And in some of the states such license or order is indispensable. But they are usually held to be for the protection of the officer only, and he may sell without such license if he can realize a fair value, not less than the inventory value, though in case of a sale for less than the inventory value, such a license will protect the officer.

Unless provided otherwise by statute, the disposition of the property may be either at public or private sale, but the statutes providing for a license to sell usually require the court to fix the method, or provide only for a public sale.

So the authority of the officer to sell may be conferred or enlarged by the will, and such sales authorized by the will usually require no license. The power to sell includes the power to sell and assign negotiable securities, also chattels real. And unless restrained by the statute the officer may pledge or mortgage the personal property to procure the necessary funds to manage the estate.

A third person buying of the officer is not bound to see that such officer properly applies or accounts

for the proceeds derived from the sale; nor will such person's title be affected by the fraud of the officer, if he himself acts in good faith with reasonable prudence and parts with value. But if such third person colludes with the officer, or has reason to believe that the officer is acting wrongfully, he cannot acquire a valid title. The officer has no right to give away the assets of the estate and the person receiving such a gift is bound to know this fact.

The officer as such has no power to bind the estate by contract, and his attempt at such a contract will bind himself only, or no one. The fact that he added the word "executor" or "administrator" to his written promise, or made the contract as such officer, will not relieve him. He can only relieve himself from personal responsibility by limiting his promise to the assets of the estate.

A judgment or decree against him in his official capacity upon a demand created by him during the settlement of the estate binds him personally. But the estate alone is bound on a cause of action created by the deceased.

In the absence of a statute authorizing it, the officer has no power to sell or mortgage the real estate. But in nearly all of the states such a power is conferred by statute for the purpose of paying the debts, and often for the purpose of paying legacies.

These statutes provide that in case of a deficiency of personal property the court may authorize the sale or mortgage of so much of the real estate as may be necessary to make up for the deficiency. Such statutes usually require, first, a petition showing

the necessity; second, a special bond from the officer to cover the proceeds of the sale; third, a formal sale, usually a public one; fourth, the execution of a proper deed under the direction of the court, and fifth, a proper disposition of the money derived from such sale.

The jurisdiction to order the sale of real estate is purely statutory, and in order that valid title may pass it is essential that the court shall have acquired jurisdiction and that all the requisites of the statute shall be substantially complied with. But there are many irregularities which will suffice to set aside such a sale if raised by appeal or a direct proceeding for that purpose, which will not suffice if the sale is attacked collaterally. The majority of the courts in this country hold that if the court had jurisdiction and notice was given to parties interested, the proceedings cannot be attacked collaterally for irregularities or for a failure to observe those requirements which were evidently not designed for the essential protection of the parties in interest.

In a few states where probate courts are held to be courts of inferior and limited jurisdiction, it is held that every fact prescribed by the statute to authorize the order of sale must affirmatively appear.

The period within which such order may be granted is usually fixed by statute; where no statute exists the application must be made within a reasonable time, and at all events before the Statute of Limitations has operated.

The officer will not be permitted directly or indi-

rectly to buy at his own sale, and if he does, the sale may be set aside.⁸⁴

The rights of creditors take precedence over those of devisees and legatees, and therefore all of the real estate, whether devised or not, may be sold under these statutes to pay debts. But legacies have necessarily no priority over devises, and lands devised will not be sold to pay legacies, except where the devise is of the residue after the payment of debts and legacies, or where the land is charged with the payment of legacies. In fact, personal property goes before real estate, and general legacies and devises before specific ones.

131. Same subject—Concerning the liability of the officer.—The liability of the officer, as such, may arise (a) from the acts of the deceased, or (b) from his own acts.

(a) *Extent of liability for acts of deceased.* To the extent of the assets the officer is liable for all the debts and contracts of the decedent upon which actions were or might have been brought in his lifetime, excepting only those contracts founded upon purely personal considerations.

The same rules govern the survival of actions against the representative, which govern the survival of actions in his favor. The liability of the officer extends only to the valid contracts and debts of the deceased, and the representative has no authority to make contracts for him or to ratify his invalid transactions.

Actions of tort against the deceased, like those in

⁸⁴ Rittenhouse v. Smith, 255 Ill. 493, 496.

his favor, die with him, at common law. But the same statutes which make them survive in his favor, usually make them survive against him.

Where two or more are jointly indebted and one dies, the action at common law is to be brought against the survivor or survivors only. If the action is on a joint obligation, and one of the plaintiffs dies, the action proceeds by the survivor only. But if the action is upon an obligation which was joint and several, the representative of the deceased party may be brought in.

The representative is bound upon those covenants of the deceased concerning real estate which were not personal to himself or terminated by his death. Thus, to the extent of the assets, the representative is bound by the covenants of the deceased in a lease or deed, and by his agreements to buy or sell land, and this whether the breach occurred before or after the death of the covenantor. But on covenants implied by law the representative is not bound unless the breach occurred during the life of the deceased.⁸⁵

It is to be observed that where an executor or administrator is authorized to enter into a deed or instrument of sale or conveyance, he is never authorized to bind the estate by any warranties or covenants of quality, value or title.⁸⁶

(b) *Officer's liability for his own acts.* The officer is personally liable for those acts either of active wrongdoing or of negligence by which the

⁸⁵ Appeal of Quain, 22 Pa. 510.

⁸⁶ Bauerle v. Long, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643.

estate suffers loss. He is usually held personally liable upon all causes of action which have arisen since the death of the deceased. When sued for causes of action arising in the lifetime of the deceased the action is against him in his official capacity, while upon causes of action arising since the death of deceased, he is sued as an individual, except that upon contracts relating to the estate, he may be sued either as an individual or in his representative capacity, if the consideration or cause of the action arose in the lifetime of the deceased.⁸⁷

132. Same subject—Concerning the payment of debts and legacies.—It is the primary duty of the officer to pay, out of the assets, the legal charges against the estate. Before the claims of the general creditors can be considered there are usually three classes of claims given precedence by statute; these are: (1) Expenses of administration. (2) Funeral expenses. (3) The allowance made for the support of the widow and minor children of the decedent.

It is the duty of the officer, if there are assets, to bury the deceased in a manner conforming to his position, and the expense incurred is properly chargeable as an expense of administration. In some states such expenses are classed with the general debts, though often given precedence, and in such cases would yield priority to the other expenses of administration.⁸⁸

If the assets exceed the amount required for the payment of the expenses of administration, then the debts of the deceased are to be paid. As to these

⁸⁷ *Luscomb v. Ballard*, 5 Gray 403 (Mass.).

⁸⁸ *Id.*

the statutes in the various states establish different orders of priority. Usually, the funeral expenses come first, and with them, frequently, the expenses of the last sickness; then debts due the government, as public rates and taxes; next judgments and debts due upon specialties, and in some states, the debts due to laborers and for rent; and finally the general debts of the deceased due to all other persons.⁸⁹

In case of a deficiency of assets the officer will render himself personally liable by paying debts of inferior rank without reserving enough to pay those of a superior rank. And in case of a deficiency of assets, all debts of the same rank share ratably, that is, they are abated ratably.⁹⁰

Public notice is required to be given by the administrator or executor, so that creditors may present their claims for allowance and payment, and the statutes prescribe a time within which claims must be presented or they will be disregarded.

In some of the states claims are to be presented to the representative, but in most of the states provision is made by statute for presentation to, and allowance by, some tribunal, appointed by the court, or else the court itself. In most cases they are

⁸⁹ Rev. Stats. of Ohio, § 6090. *McClellan v. Filson*, 44 Ohio St. 184; 8 Am. & Eng. Encyc. of Law (2d ed.), p. 1034. "At common law the personal representative was required to pay the claims against the estate of the decedent in the following order: (1) The necessary funeral expenses, the extent of which was fixed by the condition and rank of decedent; (2) necessary expenses of the administration; (3) debts of record due to the crown; (4) debts of record due to subjects, which included judgments, decrees, statutes, and recognizances; (5) debts by specialty, founded upon a valuable consideration, and debts for rent; (6) simple contract debts, based upon valuable consideration; (7) voluntary bonds or covenants; (8) other voluntary debts."

⁹⁰ *Norman v. Baldry*, 6 Sim. 621 (Eng.).

to be verified by the oath of the claimant or established by legal evidence.

As a statutory rule no action can be brought against the representative, or levy upon the assets made, during the time allowed by law for the payment of all claims, upon any claim required to be presented for allowance. The rule requiring presentation does not usually apply to those unliquidated claims which can only be determined by an action at law. A judgment can be presented for allowance.

It is the duty of the representative to interpose all defenses which the deceased might have made in his lifetime as well as those arising since his death, and to take advantage of all set-offs and counter-claims which are available. The officer will not be allowed to waive the benefit of the Statute of Limitations, or to ratify dealings which are invalid under the Statute of Frauds, or to waive the special statutes providing for presentation and allowance of claims within a specified time.

The statutes usually make provision for the allowance of contingent claims, subject to the contingency, and for allowing claims not yet due.⁹¹ Either party, if grieved by the allowance or rejection of a claim, may appeal either to a higher court, or, in states where claims are not judicially passed upon, to the courts of law.

The claims having been finally passed upon, it is the duty of the representative to lay before the court a statement of the amount and nature of the

⁹¹ 2 Woerner, *Amer. Law of Adm.* (2d ed.), § 394; 58 L. R. A. 82, note.

claims and the character of the assets available for their payment. If necessary, application for licenses for leave to sell personal or real property are then made, and sales are had, and when the assets are finally in a distributable form, an order or decree is made, determining the order or priority of payment, the amount of the dividend, where all claims cannot be paid in full, and decreeing payment in the manner so determined. The payment of the debts according to this decree may be enforced by action, and in many states by a statutory remedy, against the representative and his sureties.

Before the representative can safely pay over legacies, whether general or specific, he must see that the debts are paid. If there are contingent claims outstanding, or if legacies are made payable before the time allowed for the presentation of claims has expired, the representative is entitled to indemnity from the legatees before paying them. Unless otherwise provided by statute, legacies are deemed payable within one year from the testator's death, though the right to the legacy is deemed to vest at the testator's death. The income and profits on specific legacies accruing since the death of the testator pass with the legacies, but interest on general legacies is not allowed until after they are payable.

Specific things bequeathed are to be identified and delivered to the legatee, and general legacies are to be paid in money. The legatee has no right to take possession of his legacy until the representative consents, although if he unreasonably withholds his consent it may be compelled in equity.

Assent to a specific legacy vests the title in the legatee and is irrevocable. But if, after the delivery or payment of legacies, unexpected claims arise, equity will compel the legatees to refund.

Where a specific legacy is appropriated to the payment of debts or other legal charges against the estate, the legatee, in case the general or residuary legacies are not sufficient, is entitled to contribution from the holders of other specific legacies. The order of contribution is as follows: 1. Personal property undisposed of. 2. General residuary legacies. 3. General legacies. 4. Specific legacies.

Where lands specifically devised are taken to pay debts, the devisee is entitled to indemnity from any other class of property which should have been first taken; if there be none such, then to contribution from other devisees whose gifts are equally liable to be called on for the payment of debts. The testator may, by his will, determine the order in which his property shall be applied to the payment of debts, as by charging them in whole or in part on the realty, or upon the personal property; and the same end may be accomplished by his directing that certain of his property shall be exonerated from the payment of debts, thus charging the debts on the other classes of property.

In appropriating the assets to the payment of debts the following order is, in general, to be observed:⁹²

⁹² In Ohio, after the personal property and undevised realty are disposed of, all devises and legacies must contribute pro rata to the payment of debts. Rev. Stats. of Ohio, §§ 5972-5973.

(1) The general personal estate, unless expressly or impliedly exonerated.

(2) Lands expressly devised to pay debts.

(3) Estates which descend to the heir.

(4) Real or personal estate devised or bequeathed, charged with debts.

(5) General pecuniary legacies pro rata.

(6) Specific legacies and devises pro rata, whether in terms specific or residuary.

(7) Real or personal property of the testator appointed by the testator under a general power.

Debts and legacies will be deemed charged upon the land not only when the will expressly so declares, but also where such an intention is fairly to be inferred from the language used. Where there is sufficient personal property to pay the debts and the land is taken, the heir or devisee may have reimbursement out of the personalty. And where the debts are charged upon the land and the personal property is taken, the land will be compelled to reimburse the personal estate.

Where there are two claimants, one of whom has access to two funds while the other has access to but one of these funds, the assets will be marshalled so as to compel the first claimant to exhaust the separate fund first.

133. Co-executors and co-administrators.—The administration of the estate of a decedent may be entrusted to two or more administrators. In such a case the authority and interest of all are joint and entire, and they are looked upon in law as one person. Upon the death of one the entire authority

vests in the survivor. Each is entitled to the possession of the assets, and the possession of one is the possession of all. As respects the personal estate one may do what all may do, and the act of one within the scope of his authority is the act of all. The same good faith and prudence is required of each which would be required if there were but one.⁹³

It seems, however, that a payment made by one against the objection of his co-executor upon a claim that was barred by the Statute of Limitations in the lifetime of the testator, does not revive the claim.⁹⁴

In general, each one is liable for his own defaults only, and for the assets so far as they come into his hands. But one will be liable for the acts and defaults of another where he gives a joint bond with him, or joins in the act, or reduces the assets to the sole possession of his associate, or is guilty of negligence in permitting the default of the other, or in any way directly contributes to the default.

Breaches of duty by one may be restrained in equity, at the suit of the other, or the guilty one may be removed by the probate court. All should join in bringing actions on behalf of the estate, and should ordinarily be sued together, though one may sue or be sued alone on contracts made by him on his own account, or for goods taken out of his possession. One joint administrator cannot sue the other, or the estate, on matters connected with their administration.

A person cannot be forced into a joint administra-

⁹³ *Cross v. Long*, 66 Kan. 293, 71 Pac. 524.

⁹⁴ *Haskell v. Manson*, 200 Mass. 599.

tion against his will, but an agreement between two such joint officers, that one alone shall manage the joint estate, is void. A principal, and an ancillary administrator are not co-representatives within the meaning of these rules.

134. **Foreign representatives.**—A personal representative appointed in one state has no legal authority in another state, and cannot there sue or be sued in his official capacity. Statutes exist in many states by which a representative from another state may be appointed if no local administration has been already granted, and in a few states the foreign representative is recognized without appointment.

Administration must therefore, usually, be taken out in each state in which there are assets, but after the satisfaction, in whole or pro rata, of the local creditors, the residue of the assets will usually be transmitted to the principal jurisdiction. The amount to be allowed to the local creditors is usually determined by the proportion which the assets in all jurisdictions bear to the debts in all jurisdictions, though in some states local creditors are required to be paid in full out of local assets.

Though the foreign representative cannot sue, it is held that his assignee may; and it is also held that the voluntary payment or delivery of assets to the foreign principal representative, before a local one is appointed, will protect the party so paying.

Upon all obligations which may be enforced by or against the representative in his personal capacity, actions may be brought by or against him

in a foreign state. The allowance of a claim in one jurisdiction is held not to be conclusive on assets in another, but such claim must be presented anew where the assets exist.

135. **Administrator with the will annexed.**—The powers and duties of an administrator with the will annexed are substantially those of an executor, except that special commissions, trusts, or powers conferred by the will upon the original executor, which imply a personal confidence in the executor named, will not pass to the administrator with the will annexed.

136. **Administrator de bonis non.**—The administrator de bonis non, as the name implies, is appointed to complete the work of a former administrator. Such an officer, whether appointed in a testate or intestate estate, has all the rights and powers and is subject to all the responsibilities of an original representative so far as the estate is left unadministered. He may recover all assets from his predecessor or third persons, and may bring all actions necessary for that purpose, and is not estopped by the illegal acts of his predecessor.

Whatever his predecessor rightfully did is binding upon the administrator de bonis non, but wrongful or improper actions are not binding. The successor to an administrator is bound upon contracts of his predecessor, and may avail himself of those which are assets of the estate. He is not liable for the defaults of his predecessor, but is bound to exercise the same good faith, prudence and diligence which are required of any representative.

137. **The accounting and discharge of the administrator.**—The representative is bound to keep full and accurate accounts of his official transactions, and is usually required to render an account to the probate court at stated intervals,—frequently at the close of each year.

Upon the expiration of his trust, either by full performance, or by resignation or removal, it is his duty to render a final account. Before the final account will be allowed, notice is required to be given to parties interested in the estate that they may appear and dispute its correctness if they desire. The officer is to charge himself with all assets which have come into his possession, whether inventoried or not, and with all income, increase and profit, arising spontaneously or as a result of his good management or effort. He is to be charged also with all assets or profits which have been lost by his misconduct or negligence.

He is to be credited with all his lawful distributions and payments, with the necessary expenses and disbursements for the estate, and with his proper compensation.

At common law the officer was not entitled to compensation, but by statute in most of the states a rate of compensation is fixed, and the probate court has usually the power to, and will allow him extra compensation for extra or unusual services.⁹⁵

Upon the final allowance of his accounts by the probate court the officer is entitled to be discharged from his trust and to have his bond cancelled. Ap-

⁹⁵ *Arnold v. Alden*, 173 Ill. 229; *Colton v. Field*, 28 Ill. App. 354.

peals may be taken from orders allowing or disallowing his accounts, but unless thus appealed from, the decree allowing his final account and discharging the officer is to be regarded as conclusive, and generally such decree cannot elsewhere be called in question.

With the final allowance of his accounts and the discharge of the officer, upon a full administration of the estate, the settlement of the estate is ended.

DIVISION II

GUARDIAN AND WARD

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

138. **Persons in loco parentis.**—Sometimes it is necessary for the law to accept or designate a person to act for or in place of a parent, in the care, custody and control of infants, or of persons incapacitated to care for themselves. Such persons, as regards their general rights and duties, are said to be in loco parentis, that is, parents for the time being. Thus the relation of guardian and ward, Blackstone observes, bears a near resemblance to that of parent and child, and is plainly derived from it; the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age.⁹⁶ So the instructor or teacher who has the care of the minor's education and instruction, is said to stand in loco parentis, and to have the power to restrain and correct the pupil to the extent that may be necessary to answer the purpose for which he is employed.⁹⁷

139. **Guardianship defined.**—Guardianship arises when one person is entrusted by law with the interests of another, who from youth, inexperience,

⁹⁶ 1 Blackstone, Commentaries, p. 460.

⁹⁷ 1 Blackstone, Commentaries, p. 453.

mental weakness or other cause is disqualified from acting for himself. The person so entrusted is called the "guardian," and the individual whose person or property is entrusted to the guardian is called the "ward." The relationship is governed by judicial regulation, and is properly embraced by the term, administration of minor's estates.

140. **Guardianship at common law.**—At common law there were a variety of guardianships which are now obsolete, or are replaced by statutory enactments, or changed by the form of our institutions.⁹⁸ Blackstone mentions three species of guardians recognized by the common law, namely, guardians by nature, guardians for nurture, and guardians in socage.⁹⁹ The parents were the natural guardians; first the father and then the mother. The parents were also the guardians for nurture, and this applied to the children who by the English law were not to be heirs; it continued until the child reached the age of fourteen. If there were no parents, a discreet person was assigned to maintain and educate the infant.¹ Guardianship in socage arose where the minor was entitled to an estate in lands, and the policy of the common law demanded that the guardianship should be entrusted to the next of kin incapable of inheriting from the ward, to remove the temptation for the guardian to abuse the trust. The guardian in socage retained possession of the ward's

⁹⁸ 2 Kent, Commentaries, p. 221.

⁹⁹ 1 Blackstone, Commentaries, p. 461; In Re Galleher, 8 Cal. App. 364, 84 P. 352.

¹ Holmes v. Derrig, 127 Ia. 625, 103 N. W. 973. On the death of the parents, the grandfather or grandmother succeeds to the guardianship.

property until he attained the age of fourteen, when he could choose his own guardian.

By 12 Car. II, chap. 24, the father might appoint a testamentary guardian for the person and property of his minor children until they attain the age of twenty-one.²

The lord chancellor as the delegated agent of the king was recognized as the general and supreme guardian of all infants, as well as of idiots and lunatics. Guardians might act on the advice and direction of the chancellor in dealing with their wards' estates, and were responsible to the court of chancery for any abuse of their trust, and might be removed by such court.³

141. Guardianship in the United States.—The common law relating to guardianship has been largely replaced by legislation in the various states of the Union, and the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians, and outside of guardianship by nature, or the right of parents, when not unfit, to custody of the child's person, the common law has been entirely superseded. We have testamentary guardians, and chancery or probate guardians, but the distinction lies in the method of appointment and not otherwise. There is a distinction between the various courts known as probate, orphans', ordinary's and surrogate's, and the chancery courts. While the former have been vested with jurisdiction to appoint guardians, and to exercise a control

² 1 Blackstone, Commentaries, p. 462.

³ 1 Blackstone, Commentaries, p. 463.

over them similar to that exercised by the court of chancery in England, and sometimes to the exclusion of the chancery courts, yet unless the terms are exclusive the court of chancery still retains its general supervision.⁴

142. Same subject—The parents as natural guardians.—Quite generally the father, and on his death the mother, is regarded as the natural guardian of the person of the ward, but neither parent is recognized as the guardian of the property coming to the child by gift, devise, etc., unless so appointed by a court of competent jurisdiction.⁵

143. Appointment of guardians.—Guardians derive their authority either from the law, as in the case of natural guardians, or from a special appointment. The special appointment may be by the parent, by the infant himself, or by a competent court.⁶

The legal right of the parents to the custody of minor children will be treated in "Law of Persons and Domestic Relations." But at the death of the parents the next of kin do not succeed to their right of natural guardianship. The mother of a bastard child is its natural guardian and not the putative father.⁷

144. Same subject—Appointment by the parent.—Whether testamentary guardianship was recog-

⁴ Matter of Andrews, 1 Johns. Ch. 99 (N. Y.), LEADING ILLUSTRATIVE CASES.

⁵ In the matter of Roberts, 3 Johns. Ch. 43 (N. Y.); Schouler, Dom. Rel., 298; Power v. Harlow, 57 Mich. 107, 23 N. W. 606.

⁶ In Re Brady, 10 Ida. 366, 79 P. 75.

⁷ Wright v. Wright, 2 Mass. 109; 2 Kent, Commentaries, p. 223.

nized under the old common law is questionable. However, the English statute of 12 Car. II expressly conferred this right upon the father and this has been generally adopted in this country. This power thus conferred, when exercised to its full extent, invested the testamentary guardian with an authority over the children almost as extensive as that of the father himself. The statute, and the state statutes following it, entirely ignored the rights of the mother, and in states where the law has not been subsequently changed, she has no right to appoint a testamentary guardian for her children, even though the father is dead.⁸ This exclusive power of the father to appoint the testamentary guardian has now, in most states, been abrogated by statute, so as to allow the same right to the mother after the father's death.⁹

Usually, before confirming such an appointment, the court requires that sureties be furnished, unless there is exemption by the appointment. A parol appointment is insufficient.

A testator cannot appoint a testamentary guardian except to his own children; but an attempt to appoint one for others may create a trust.¹⁰ A firm cannot be made a testamentary guardian, nor could a corporation formerly, but certain financial corporations are now chartered with power to assume fiduciary trusts.¹¹

⁸ 2 L. R. A. (N. S.) 203, note; *Hernandez v. Thomas*, 50 Fla. 522, 39 So. 641.

⁹ *Kellogg v. Burdick*, 96 N. Y. S. 965, 110 App. Div. 472; *Wadsworth v. Connell*, 104 Ill. 369.

¹⁰ *Camp v. Pittman*, 90 N. C. 615.

¹¹ *Rice's Case*, 42 Mich. 528; *Schoul. Dom. Rel.* (5th ed.), § 301.

145. **Same subject—Appointment by the court.**

—The appointment of a guardian solely by the infant himself, as at common law when the infant at fourteen could supersede a guardian in socage by one of his own choosing, is not now permitted. Infants have still the privilege of selecting a guardian when of this age, but the person selected must be authorized and appointed by the proper court. This is a matter of statute, and the privilege is not uniform.¹²

If the infant is not of age to select, and no person has been appointed by the will of the parent, the court will appoint a fit person. The court is governed in its appointment by the statutes. The usual procedure is for a relative or someone interested in the appointment to petition the probate court, setting forth the facts in the case and asking the appointment of a guardian. Where the child is over fourteen years of age it may assent to the petition, and the parent or next of kin also join in the petition. But if the interested persons do not thus assent, the person petitioning must give notice to them that they may appear in court, show that the infant's interests demand the appointment of a guardian, and ask that a suitable person be selected.¹³

Before the letters of guardianship are issued the court requires the filing of a bond by the guardian to account for the property of the ward; this bond is made to correspond to the amount of the ward's

¹² *Ham v. Ham*, 15 Gratt. 74 (Va.); *Dibble v. Dibble*, 8 Ind. 307; Rev. Stats. of Ohio, § 6257.

¹³ *Taff v. Hosmer*, 14 Mich. 249, LEADING ILLUSTRATIVE CASES.

personal and real property of which the guardian will have the control.¹⁴

146. The court appointing.—As has been seen, the chancery courts have been superseded in this country by the special county courts, as probate, orphans', surrogate, etc., which usually issue the letters of guardianship under their official seal. In some states the chancery and county courts exercise concurrent jurisdiction.¹⁵

The court in the county of the ward's domicile has jurisdiction to appoint, and if the ward is a non-resident, the court of the county in which he has property. If the property is in two or more counties, the court in which the application is first made takes and retains jurisdiction.¹⁶

147. Who should be appointed guardian.—The court appointing has the widest discretion to appoint a guardian for the best interests of the child, preference being given a surviving parent, or a relative, and the court will be guided but not controlled by the wishes of the parent.¹⁷ The leading consideration for the court should be the interest and welfare of the child, and this, which has become the only rule of choice as between distant kindred, may control even the selection of the father himself.¹⁸ But local statutes may and do specify

¹⁴ Rev. Stats. of Ohio, § 6259.

¹⁵ Schouler, Domestic Relations, § 303; *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679.

¹⁶ *In re Danneker's Guardianship*, 67 Cal. 643, LEADING ILLUSTRATIVE CASES, and *Rice's Case*, 42 Mich. 528.

¹⁷ *Heinemann's Appeal*, 96 Pa. St. 112; *Wardwell v. Wardwell*, 91 Mass. 518; Schouler, Domestic Relations, §§ 304, 305.

¹⁸ *Badenhoof v. Johnson*, 11 Nev. 87.

to what extent the surviving parent and next of kin are entitled to preference.¹⁹

The father's informal testamentary appointment or his deathbed wishes may control the court; also that of the mother in states which recognize her right of choice.²⁰

148. Rights and duties of guardian.—Subject to the regulation of the court, a guardian of the person of a ward is entitled to the custody of his ward not only as against the wishes of near relatives, but also as against the wishes of a parent.²¹ The rights of a guardian may be restrained by an order of court to conform to the best interests of the child.

The guardian may change the domicile of the ward, within the state, but a prejudicial removal of the ward from the state may be restrained.²² The parent as guardian has more authority to change the domicile. The guardian may select the place of the ward's education, and may protect him from improper associates.²³ The guardian has no right to the ward's services, and cannot maintain an action for the seduction of a female ward.²⁴

149. Same subject—Duties as to ward's person.—The guardian's duties are those of the parent: protection, education, and maintenance. But his duties differ in that he is bound to maintain the ward

¹⁹ *Weldon v. Keen*, 37 N. J. Eq. 251.

²⁰ *Schouler*, *Domestic Relations*, § 305; *Matter of De Marcellin*, 31 N. Y. Supr. 207.

²¹ *Senseman's Appeal*, 21 Pa. St. 331.

²² 2 Kent Com. 227; *Wilcox v. Wilcox*, 14 N. Y. 575.

²³ *Wood v. Gale*, 10 N. H. 247.

²⁴ *Blanchard v. Ilsley*, 120 Mass. 187; but see subject, DOMESTIC RELATIONS.

only to the extent of the ward's own estate. If there is no estate the ward must be put to work, or if too young, may be entrusted to a charitable institution.²⁵ The guardian may bind himself for the ward's maintenance if he fails to limit the liability to the property in his hands.²⁶ The father as guardian cannot use the child's income or principal, save by authority of court, as ordinarily it is his duty as parent to support the child.

150. Same subject—As to ward's property.—The guardian's trust is one of obligation and duty, and not of speculation and profit.²⁷ The guardian obligates himself to conform to the power of his appointment, and carry out the duties he assumes with the same prudence, care and diligence which a good business man would use in the management of his own property. The ward's interest being the constant consideration of the chancery court, it is held that unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; but for unauthorized acts which cause a loss, the guardian is amenable.²⁸

As a general rule the guardian can expend no more than the income of his ward's estate without the sanction of the court.²⁹ The order in which the ward's property is to be applied to his maintenance is, first, the interest or income, next, the personalty, and, last, if necessary, the real estate. But the real

²⁵ Browne, Domestic Relations, 95.

²⁶ Hutchinson v. Hutchinson, 19 Vt. 437.

²⁷ 2 Kent Com. 229.

²⁸ Schouler, Domestic Relations, § 341.

²⁹ State v. Clark, 16 Ind. 97, LEADING ILLUSTRATIVE CASES.

property is never to be sold unless necessary for maintenance, and then only by the order of the court.³⁰ The guardian is allowed a liberal discretion in expenditures for the ward's maintenance and education, if he does not intrench upon the ward's capital.³¹

The guardian may render himself liable by acts of negligence in dealing with the ward's property, and the proper way in case of doubt is for him to seek the advice of the court and be governed by it.³² He should not mingle his ward's money with his own or use it in his own profit.³³ The guardian cannot make profit by buying the property of the ward, nor by selling his property to the ward.³⁴

Within a reasonable time after his appointment the guardian should set aside a reasonable sum for his ward's current expenses, and the balance he should safely invest for the benefit of the ward. He cannot long suffer his ward's money to be unproductive, and if he does he becomes chargeable with interest.³⁵ And for fraud or positive misconduct in the management of the ward's money he may be chargeable with compound interest.³⁶

In some states it is provided by statute in what securities the guardian may invest his ward's funds; but in general all public securities, like state or national bonds, are to be preferred, and real estate

³⁰ *Strong v. Moe*, 8 Allen 125 (Mass.).

³¹ *Karney v. Vale*, 56 Ind. 542; *Chubb v. Bradley*, 58 Mich. 268.

³² *Lamar v. Micou*, 112 U. S. 452.

³³ *State v. Sanders*, 62 Ind. 562.

³⁴ *Lane v. Taylor*, 40 Ind. 495; *Bostwick v. Atkins*, 3 N. Y. 53.

³⁵ *McKim v. Morse*, 130 Mass. 439.

³⁶ *Stark v. Gamble*, 43 N. H. 465; Rev. Stats. of Ohio, § 6269.

security is preferred to investment in railroad stock.³⁷ Small sums of money may be deposited in a savings bank. In case of doubt as to proper securities the prudent course is to petition the court for direction, and then act strictly as directed.³⁸ Where the statute prescribes the security it should be followed.³⁹

151. Same subject—Sale of real estate by guardian.—The guardian cannot sell the ward's real estate without an order of the court. The proceeding is, usually: (1) Petition to the court for a license to sell, stating the reason for so doing, which is the insufficiency of the ward's other property; (2) filing a bond with the court to account for the proceeds of the sale; (3) selling as directed by the court, at public or private sale; (4) execution and delivery of deeds by the guardian and ward, without covenants; (5) properly applying the proceeds as ordered by the court, and this may include the reinvestment of a surplus fund, after the payment of debts and providing for the support of the child.⁴⁰ The guardian cannot bind his ward by any covenants of warranty in the deed, but he may bind himself. The deed has the effect of a quitclaim of the ward's interest.⁴¹

152. Guardian's accounts.—The guardian is required to account to the court appointing him, from

³⁷ Worrell's Appeal, 23 Pa. St. 44.

³⁸ O'Hara v. Shepherd, 3 Md. Ch. 306.

³⁹ McIntyre v. People, 103 Ill. 142.

⁴⁰ Shanks v. Seamonds & Campbell, 24 Iowa 131; Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364; Schouler, Domestic Relations, § 360.

⁴¹ State v. Clark, 28 Ind. 138; Byrd v. Turpin, 62 Ga. 591.

time to time, as to the condition of the ward's estate.⁴² The first account shows the extent of the ward's property, and intermediate accounts, though required, are not conclusive even when judicially approved. They serve to keep the court informed of the general condition of the trust fund, and as to whether or not the guardian's bond should be increased, but they may be inquired into afterwards. At the expiration of the trust the guardian is required to file a final account, and in this account all previous accounts may be examined by the court to determine the fairness of his management of the ward's estate. When the final account has been examined and approved by the court, and not reversed on appeal, the account, together with those which preceded it, concludes all parties interested, and may not be reopened or annulled in any court. But in some states it might be set aside for fraud or manifest error.⁴³

153. **Termination of the guardian's authority.**—Guardianship lasts until the end of the period for which it was instituted, but it may be sooner terminated by the death or marriage of the ward;⁴⁴ and the authority of a particular guardian may be terminated by death, resignation or removal before the period has expired. Formerly a woman guardian was deprived of her authority at marriage, but under modern statutes removing the old disabilities of married women, the marriage of a female guardian does not terminate the office, but she will be al-

⁴² *Curtis v. Devoe*, 121 Cal. 468, 53 P. 936.

⁴³ *Schouler*, Domestic Relations, § 372; *Cummings v. Cummings*, 128 Mass. 532.

⁴⁴ *In re Kincaid's Estate*, 120 Cal. 203, 52 P. 492.

lowed to remain guardian by consent of her husband.⁴⁵

Marriage of the ward terminates the power of the guardian over the ward's person, whether male or female.⁴⁶ The property of the male ward may be retained by the guardian, regardless of the marriage.

The guardianship continues until the ward has arrived at the age of majority, unless the statute has modified the rule. The guardianship of insane persons and spendthrifts, where authorized, continues according to the ward's necessity.

The guardian may be removed at any time for abuse of his trust. The statutes prescribe the causes for which he may be removed, and these include incompetency and removal from the state. When a guardian has been removed, or the ward is of age to choose a guardian, another is appointed to supersede the one removed.⁴⁷ Natural guardians who have once accepted must serve until released by the court.⁴⁸

154. Compensation of guardians.—In England the rule has always prevailed that the services of executors, guardians and trustees should be treated as honorary and gratuitous, chancery allowing reimbursement for necessary expenses incurred. But this rule has not been followed in the American states. The local law either prescribes a certain per centum or commission as compensation, or per-

⁴⁵ *Cotton's Guardian v. Wolf*, 14 Bush 238 (Ky.).

⁴⁶ *State v. Parrish*, 1 Ind. App. 441, 27 N. E. 652.

⁴⁷ Schouler, *Domestic Relations*, chap. 3, art. IV.

⁴⁸ Browne, *Domestic Relations*, 93; *Ex parte Crumb*, 2 Johns. Ch. 439 (N. Y.).

mits the court to fix a just and reasonable compensation.⁴⁹

155. **Rights and liabilities of the ward.**—During the guardianship the ward may restrain the guardian from committing waste, and may file an action by his next friend for an accounting. Also, when the guardianship has terminated he has an action for an account. This action must be brought in a reasonable time, as long acquiescence will debar the suit.⁵⁰

The court will aid the ward to recover any property embezzled, concealed or conveyed by the guardian in fraud of his rights. The usual proceeding is by bill in equity. The statutes in some states provide for an inquisition for the discovery of property missing from the ward's estate.⁵¹

The guardian can bind the infant within the scope of his general powers, or as authorized by the court, but actions not within his powers and prejudicial to the ward may be disaffirmed by the ward on reaching majority. This is called the infant's right of election, but the court of equity may control this privilege and pronounce a doubtful transaction by the guardian good.⁵²

A gift or conveyance from ward to guardian during or shortly after the termination of the guardianship is presumed fraudulent, and will not be sustained except on the clearest proof of good faith

⁴⁹ In the Matter of Roberts, 3 Johns. Ch. 43 (N. Y.); Gott v. Culp, 45 Mich. 265.

⁵⁰ Aaron v. Mendel, 78 Ky. 427.

⁵¹ Cobb v. Kempton, 154 Mass. 266.

⁵² Schouler, Domestic Relations, § 385.

on the part of the guardian. And this applies to anyone in loco parentis.⁵³ So where the guardian has taken real estate or mortgage notes in his own name but with the consideration coming from the ward's estate, he will be regarded as a trustee for the ward.⁵⁴

The infant may have a special guardian appointed to manage a suit in court; this is called a guardian ad litem.

BIBLIOGRAPHY.

For supplemental reading the following works are recommended. They are set forth in the order of what the author believes to be their relative importance to the student of this text:

WILLS: *Jarman* on Wills (6th ed.); *Page* on Wills; *Underhill* on Wills; *Schouler* on Wills (2nd ed.); *Redfield* on Wills (3rd ed.); *Wigram* on Wills.

DESCENT AND DISTRIBUTION: *Abbott*, Probate Law.

ADMINISTRATION OF DECEDENTS' ESTATES: *Woerner*, American Law of Administration (2nd. ed.); *Schouler*, Executors and Administrators (3rd ed.); *Williams* on Executors (9th Eng. ed., 7th Am. ed.).

GUARDIAN AND WARD: *Woerner* on Guardianship; *Schouler*, Domestic Relations (4th ed.); *Reeves*, Domestic Relations (4th ed.).

⁵³ *Berkmeyer v. Kellerman*, 32 Ohio St. 239.

⁵⁴ *Fogler v. Buck*, 66 Me. 205.

QUIZ QUESTIONS

DESCENT AND DISTRIBUTION

WILLS AND ADMINISTRATION

GUARDIAN AND WARD

(The numbers refer to the numbered sections in the text.)

- 6-8. Define descent.
9. A bachelor dies without a will. He leaves no brothers and sisters, nor children of brothers and sisters. To whom will his real estate descend, at common law?
11. Would it make any difference in the above question, if his father and mother were still living? State the rule.
- 12-15. Suppose, in question 9, that the deceased left a brother and two sisters. (a) How would the real estate go? (b) Would his personal property go the same way?
- 16-17. What is meant by "blood of the first purchaser"?
18. What is the rule, at common law, relative to the rights of a half-brother on the mother's side? Suppose a man died leaving a widow with a male child. The widow married a second time and there was born another male child. Subsequently the first male child died owning real estate. To whom would this go at common law? State the rule.
- 20-23. What is meant by "who last died actually seized," and when is that important?
- 24-25. Suppose that one died a bachelor leaving real estate; that he was the only child of his parents who were the only children of their parents. His father and mother predeceased him. To whom would his property go at common law? Under statutes?
29. What is the rule relative to illegitimate children?
30. To what extent do the rules of distribution apply to real estate?

34. Define "will."
35. What is a nuncupative will?
36. What is a codicil?
- 38-43. Give a brief sketch of the origin and history of wills.
- 44-45. Who may make a will?
46. Suppose a man makes a will disposing of "all my property to my son." After making the will, he sells all his real estate, but later buys other real estate. At the time he made the will, he had \$500 cash in the bank. At his death he leaves the real estate he bought after the making of the will and \$5,000 in the bank. What does the son take under the will?
- 47-48. Can one sell his right to make a will? State reasons.
50. What is meant by "alternative wills"?
53. When will insanity operate to nullify a will?
54. What is the rule as to a married woman's right to make a will?
- 55-56. Can a child 9 years of age make a will? Give reasons.
61. Can a provision in a will be legally made for unborn illegitimate children?
63. Explain what is meant by the statement that a will is "ambulatory."
- 66-68. Suppose it is shown that a will of a testator was obtained by the fraud of one of the beneficiaries. The will contains also provisions for others who had nothing to do with procuring its execution. What are the chances of setting the will aside? State the rule.
69. When can it be said that a will is produced by fraud as distinguished from undue influence?
70. Give an example of undue influence sufficient to set aside a will.
- 71-76. After death of testator it was contended that he executed the will by mistake. Is this a valid objection to the validity of the will? State the rules.
- 78-80. Is it sufficient if the signature appears in the body of the will? State the rule.
- 81-82. What is meant by "incorporation by reference"?
83. A, in his last will, directs \$1,000 to be given to such person as shall succeed in flying over the Atlantic Ocean. Is that bequest good?

84. The same testator also gives \$500 to be divided among those of his friends whose names appeared in the "Star" newspaper published in Blankville, on June 1st, 1912. Is that bequest good?
- 86-87. Who may be an attesting witness?
88. What is meant by attestation?
- 89-90. One who had executed his will, which required attestation by two witnesses, called in one neighbor in the forenoon as witness and acknowledged the instrument as his will, whereupon the witness signed. In the afternoon the testator called in another neighbor and acknowledged the will to him, whereupon that neighbor signed. Is the will valid? State full reasons.
91. When is the testator's intention material?
92. When does a subsequent will revoke a prior one? State rule.
- 93-95. A testator had a will prepared by his attorney, who made a draft in duplicate. The one copy was properly executed and attested and this the testator took along intending to put it with his other valuable papers. On his way home he stopped at a tavern where he imbibed freely to the extent of intoxication, and while thus under the influence of liquor, took all his papers out of his pockets, the will included, and destroyed them. On his way home he met with an accident and was instantly killed. Did he die testate or intestate?
96. What is meant by "dependent relative revocation"? State the rule.
- 97-98. A testator makes a will and then marries. He dies subsequently without making a new will. Does he die testate or intestate? State the rule. Suppose children have been born. Would that change the rule?
99. Does divorce revoke a will?
100. When is a will republished, and what is the effect of republication?
101. What is the exception to the rule that a codicil to a will makes the will speak from the date of the codicil?
104. What is the distinction between a lapsed and a void legacy or devise?

105. Suppose a will gives \$500 to A and A dies before the testator. What becomes of the \$500 legacy?
106. What is the rule where a devise is given to "all who are now my servants" and some of these servants die before the testator?
- 110-111. Suppose one wills a piece of real estate to A and before his death sells the real estate and deposits the money in a bank where it remains until his death. What does A get?
112. What is meant by ademption of specific legacies?
- 113-114. What is the effect of a gift by the testator to a beneficiary under the will, during the testator's lifetime? What is that called?
115. State the meaning and give the history of "probate."
- 117-118. What is "administration"?
119. What would you say of the jurisdiction of courts in the administration of decedents' estates?
120. Who has the first right to administer upon an estate? Who has the next right?
- 121-122. Suppose that the person entitled to administration is determined and he is ready to accept the office; what is the next step to be observed?
123. What is the force of acts of one purporting to be an administrator or executor, in the matter of the estate, before authority is actually conferred?
124. The various beneficiaries under a will petition the court to remove the executor because they do not find him as congenial as they might wish. What should the court do?
- 125-126. What are the duties of an executor or an administrator?
127. As a result of a breach of promise to marry, the young lady in question died. Can her administrator sue the other party for the breach?
128. What should the inventory contain?
129. What is the rule relative to the administrator's right where a building upon property of the deceased, covered by insurance taken out by deceased, is consumed by fire?
130. If you were administrator of an estate and as such administrator received a large sum of money in cash, belonging to the estate, what would you do with it?

131. Suppose the deceased was the owner of and conducted a factory; that through the negligence of one of the managers thereof someone was injured therein, during the life of the deceased; and that no action was brought until after the decease of the owner. Against whom should it be brought under the rules of the common law?
132. What was the order in which debts were payable out of the estate of the deceased, at common law?
133. To what extent is one of two joint executors or administrators bound by the acts of the other?
134. The deceased died in California and administration was taken out there. The deceased left money in deposit in New York City. What steps should be taken to enable the California administrator to get this money?
135. Define "administrator with the will annexed."
136. Define "administrator de bonis non."
137. What compensation is an administrator entitled to?
- 138-139. Define guardianship.
- 140-141. What are the various kinds of guardianship in the United States?
142. (a) Who are natural guardians? (b) What jurisdiction has a natural guardian over the property of his ward?
- 143-144. (a) What is meant by "testamentary guardianship"? (b) Who can be made testamentary guardian?
- 145-147. Where the court appoints the guardian, who should be appointed?
- 148-149. What is the guardian's power and control over the person of the ward?
150. Suppose you became guardian of a ward whose estate consisted of \$25,000 in gold which lay in a safety deposit vault. What is the first thing you would do?
151. In what manner may a guardian dispose of his ward's real estate?
153. State six ways in which the period of guardianship may be terminated.
154. Is a guardian entitled to compensation?
155. (a) If the guardian exceeds his authority in his administration of the ward's property, what remedies has the ward? (b) Is a gift from ward to guardian, good? (c) What is a guardian ad litem?

PART II

INSURANCE

BY

HENRY WILBUR HUMBLE, A.M., LL.B.*

INTRODUCTION

CHAPTER I.

THEORY, HISTORY AND SIGNIFICANCE.

1. **Theory.**—A thousand able-bodied men, with no means of support except their salaries, may be confronted with this question, What would become of our families if we should die tomorrow? One of their number may assure them that, through careful study and observation for twenty-five years, he is reasonably certain that three of them will die within the next twelve months, but that no one knows which three, and that the three prospective widows may be kept from the poorhouse if they each receive \$1,000 upon their husbands' deaths.

Obviously, there is but one thing to do. Let each man contribute three dollars to a common fund with the understanding that each of the three widows is to have one-third of the total. Thus they would bear each other's burdens and so fulfill the law of

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the Master. Surely, the fact that this is done in a scientific and exact manner in no wise detracts from its high religious and ethical value. An eminent divine, T. De Witt Talmadge, was so overcome with the religious aspects of life insurance that he preached it from the pulpit.

2. **History.**—There is but slight evidence of the existence of insurance before the Middle Ages. However, in the thirteenth century, insurance made its way into the commerce of Europe through the energy of Italian merchants, appeared in England along with negotiable instruments and was controlled by the same body of law, the law merchant.

Hand in hand, the law of negotiable instruments and insurance law made inroads into the English common law. Both were first administered by separate courts with jurisdiction limited to disputes between merchants; both were accepted finally in the eighteenth century as parts of the common law and were administered thereafter by the ordinary common law courts.

As we might expect, marine insurance is the oldest. Then followed the birth of fire insurance in England in the latter part of the seventeenth century, though, strange as it may seem to us, it was viewed with such suspicion and so discouraged by taxation that it did not become extensive until after 1869. Life insurance followed soon after fire insurance and became widespread only when fire insurance did, in the latter half of the nineteenth century.

In the United States fire and life insurance became extensive at the same time as in England. How-

ever, marine insurance is still of comparatively slight importance here for the simple reason that we have so little need for such insurance.

The most striking characteristic of the insurance business in this country is the aggressive campaign of life insurance agents or solicitors. Perhaps no other business in the world has been built up and maintained to such an extent by unremitting personal solicitation and appeal. These methods, it is contended, are of priceless value in educating the public in the blessings of thrift and provision for the future. Fire insurance companies do not have to do business in this way, since, after much antipathy in and out of governmental circles, opposition to the existence of fire insurance has died out completely. Today it is asserted that American life insurance, if not our greatest industry, when measured by the amount of money involved, is second only to the railroads. However, it is difficult to prove such assertions.

The future of insurance is more fascinating than its past. As fast as the statistics can be gathered and tabulated new forms of insurance are springing up. To say nothing of the infinite forms of life insurance policies made possible through the collection of data and the application of mathematics, we have today, among others: fidelity, accident, health, burglary, employers' liability, automobile liability, credit indemnity, fly wheel, plate glass, automatic sprinkler leakage, steam boiler, real estate title, tornado, wind, hail, flood, lightning and strike insurance.

3. **Economic significance.**—A large proportion of murders and from fifteen to fifty per cent of our fire losses would not occur but for the fact that the life and fire insurance exists. Nevertheless, the advantages of these forms of insurance so completely outweigh the disadvantages that no sane person would argue in favor of their extinction.

However, opposition has arisen, for obvious reasons, to certain forms of insurance, for example, the insurance of the lives of children of tender years, completely under the control of their parents, particularly when insured in favor of those in custody of them for a sum greater than funeral expenses.

4. **Insurance as a separate legal study.**—A knowledge of the law of agency and contracts is an essential prerequisite to a course in insurance law for the same reason that such knowledge is necessary in the study of carriers or corporations. However, one who knows only the fundamental principles of agency and contracts knows no more, and no less, about the problems of insurance than he does about carriers and corporations.

With our industrial development, the course of study in our law schools must change to some extent. The law in relation to automobiles may soon form part of the regular law school course. Then, if the government takes over the business of carriage and insurance, these subjects may be dropped as fundamental courses. Until such changes occur, however, a knowledge of the law of insurance will remain as a desirable part of legal education.

FUNDAMENTAL PRINCIPLES

CHAPTER II.

INSURABLE INTEREST.

5. **Necessity of insurable interest.**—Should X be permitted to insure the house or life of S, a perfect stranger who is not X's landlord nor in any way connected with X by blood, marriage or business association? Clearly not. Should X desire such insurance it is only too probable that he intends to commit arson, murder, or both. Therefore, the law forbids one to insure the property or life of another unless there is a reasonable expectation that the former in his position desires that the loss shall not occur, or that it shall be put off as long as possible in the case of life insurance. Nevertheless, as fundamental as this requirement of insurable interest may appear, statutes¹ had to be passed in England to put a stop to the practice of insurance by persons not possessed of insurable interest in the life or property insured. Thus, by statute in England, "interest or no interest" policies became illegal. Blackstone regards such contracts as voidable on the ground that they are wagering contracts.

¹ 19 Geo. II. c. 37 (1746); 14 Geo. III. c. 48 (1774).

Possibly, the earlier English decisions held an insurable interest to be necessary and at first the phrase "interest or no interest" may have been designed merely to cast the burden of proving a want of interest on the insurer, and furthermore the statutory changes may have destroyed merely an unfortunate perversion of the original common law rule.² At all events, in the United States, irrespective of statute, an insurable interest is requisite, except in New Jersey, where the rule is still doubtful.³

6. Insurable interest in property.—The same principles in regard to insurable interest determine the validity of fire and marine insurance contracts. Therefore the two should not be separated in our present discussion.

Insurable interest and ownership must not be confused. Though it is true that either legal or equitable ownership is sufficient to give the owner an insurable interest in the property, much less than this will suffice. On the other hand, one may be almost mathematically certain that he will soon be the owner of property and yet have no insurable interest. The line is drawn between interest and no interest for insurance purposes in a very different manner from the mode adopted in the law of property in determining when one has a property interest in a thing. However, we may say that insurance follows the law in many cases. For example, real property is devised to A for life, remainder to B in

² Lord Eldon in *Lucena v. Craufurd*, 2 Bos. & P. N. R. 269 (Eng.); Conn. Mut. Life Ins. Co. v. *Schaefer*, 94 U. S. 457, 460.

³ *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066.

case A dies without issue. Though A has twenty healthy children and B is ninety years of age and on his deathbed, B has an insurable interest in the property, because he has a legal interest in it. On the other hand, the only son and prospective heir of an aged insane man who cannot and has not made a will cannot insure his father's homestead, because he has no present legal right to the property.⁴ There is but one way out for this son; on being appointed guardian for his father, he may insure his father's interest.

Owner of legal title. The owner of property at law has an insurable interest in the same even though he has but a naked legal title, as in the case of a trustee. However, if he is but a trustee he will hold the money received from the insurance company in case of loss subject to the same trusts as the property destroyed, since otherwise the trustee would be encouraged to commit arson.

Among other legal owners, an assignee for the benefit of creditors may insure property coming to him as assignee.⁵ An administrator has been held to have an insurable interest in the real property of the deceased, at least when the personal property is insufficient to pay debts.⁶ But suppose that the administrator insures the lands of an intestate at a time when it is doubtful whether or not the personalty will be sufficient to pay the debts. Probably the court would hold that there is an insurable in-

⁴ *Lucena v. Craufurd*, 2 Bos. & P. N. R. 269, 324 (Eng.).

⁵ *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473, LEADING ILLUSTRATIVE CASES.

⁶ *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

terest until it is definitely ascertained that the personality will be sufficient to satisfy creditors.

Moreover, the owner of land to which a church building has been permanently annexed may insure the structure, though bound to convey to the church society upon certain conditions.⁷

Claimant in equity. One having a property interest enforceable in a court of equity has an insurable interest in such property. Take, for example, a mortgagor's interest, which is but equitable today in many states and was purely equitable at common law. The mortgagor may insure the property even though it is mortgaged to its full value⁸ and even though, by statute, the mortgagor is excused from personal liability for the debt.⁹ This is true for the reason that the mortgagor relies upon the property as the means with which to pay.

Furthermore, a mortgagor continues to have an insurable interest until after the time for redemption has expired. Even though the right to redeem has been seized upon execution, the mortgagor retains an insurable interest, if he can still redeem notwithstanding the seizure.¹⁰ However, if the right to redeem has expired, the mortgagor cannot recover for a subsequent loss, even though the mortgagee has promised to allow payment and redemption, if the mortgagee's promise cannot be enforced because of want of consideration.¹¹

⁷ Oakman v. Dorchester Mut. Fire Ins. Co., 98 Mass. 57.

⁸ Higginson v. Dall, 13 Mass. 96.

⁹ Royal Ins. Co. v. Stinson, 103 U. S. 25, 29.

¹⁰ Strong v. Manufacturers' Ins. Co., 10 Pick. 40 (Mass.).

¹¹ Pope v. Glens Falls Ins. Co., 136 Ala. 670, 34 South. 29.

Lien holders. The holder of a specific lien upon property has an insurable interest in such property.¹² But, suppose that the lien is not specific but general. Take, for example, the case of a judgment creditor whose lien attaches to all the debtor's real estate within the county. It has been held that such a lien holder has no insurable interest, on the ground that he "is not interested in the property as property, but only in his lien."¹³ However, the lien is the one interest with which any lien holder is concerned. The fact, then, that a general lien holder's lien is more extensive than that of a special lien holder should not deprive him of his right to insure.

Where the insured fitted up a vessel with the understanding that he was to have a lien on the outfit, but completely surrendered all possession or control over the goods and thus waived his lien, it was held, very properly, that he had no lien and hence no insurable interest.¹⁴ Obviously, whether or not a lien exists is a question of law, and merely thinking that one has a lien is not the same as having it, even for the purpose of insurance.

Creditor's interest in debtor's property. A simple contract creditor with a merely personal claim against his debtor, has no insurable interest in the debtor's property.¹⁵ Where, however, the debtor has made an assignment for the benefit of his creditors,

¹² Briggs v. Merchant Traders' Assn., 13 Q. B. 167 (Eng.).

¹³ Grevemeyer v. South. Mut. Fire Ins. Co., 62 Pa. 340, 1 Am. Rep. 420; Light v. Countrymen's, etc., Ins. Co., 169 Pa. St. 310, 32 Atl. 439.

¹⁴ Folson v. Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

¹⁵ Creed v. Sun Fire Office, 101 Ala. 522, 23 L. R. A. 177.

or has assented to the insurance, the creditor's insurable interest has been recognized.

After the debtor has died, and it appears that his personal property is insufficient to pay his debts, the creditor may insure his debtor's real estate.¹⁶ With the death of the debtor, all personal liability ends and the creditor acquires rights in rem which he did not possess before. And thus, when the possibility of insuring the debtor's life becomes extinct, the right to insure his property arises.

As affected by possession. If title to property has passed, but not possession, it is clear that the person receiving title may insure. If possession, but not title, has passed, the one in possession without title may insure.¹⁷

Executory agreements. Suppose that neither title nor possession has passed. For example, A has made an executory contract with B for the purchase of a fine race horse at a much lower figure than its real worth. Obviously, if the horse dies, A cannot sue for breach of contract, and if B becomes insolvent, A may have to share merely as a general creditor of B. Accordingly, it has been held that A may insure the horse.¹⁸

Profits. Ordinary fire insurance of a building used for business purposes does not entitle the insured to compensation for profits which may be lost between the time of the fire and the restoration of the build-

¹⁶ *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, LEADING ILLUSTRATIVE CASES.

¹⁷ *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312.

¹⁸ *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466, LEADING ILLUSTRATIVE CASES.

ing. But suppose that the policy expressly covers profits. Must such profits, to be insurable, be of sufficient certainty to allow their recovery in an action for damages against one who tortiously causes the loss? Apparently, the English courts have leaned towards an affirmative answer to this question.¹⁹ In the United States, however, the insured need not show that such profits were probable.²⁰

Reinsurance. It is well settled today that an insurance company, itself, may insure, with another insurance company, property which it has already insured. This common practice is known as reinsurance and is resorted to when a company decides that it has more insurance than it cares to carry on a certain risk or in a certain neighborhood.

This common practice was made illegal by statute, in England, in 1746.²¹ The reason given for passing such legislation was that reinsurance promoted speculation in insurance premiums. By analogy, if we would break up speculating in wheat we should make it illegal for one who has bought a bushel of wheat to resell it. The English statute proved too drastic and was repealed, but only after more than a hundred years of its existence.²²

Insufficient interest. A turnpike company in Pennsylvania donated over five thousand dollars towards the erection of a sixteen thousand dollar county bridge, not as a matter of philanthropy, but to increase the turnpike company's dividends. It

¹⁹ *Hodgson v. Glover*, 6 East 316 (Eng.).

²⁰ *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222 (U. S.).

²¹ 19 Geo. II., c. 37, s. 4.

²² 27 and 28 Vict., c. 56, s. 1 (1864).

then insured the bridge, but it was held, after the bridge had been destroyed, that the company had no insurable interest.²³ The court decided the case on a principle similar to the one in torts restricting the recovery of damages for public nuisance to those who have received special damage. The court declared there "was not a right peculiar to the plaintiff."

This case is not without a sequel. The turnpike company, undaunted, proceeded to sue to recover the insurance premiums which had been duly paid. The insurance company then pleaded the Statute of Limitations and the court sustained the plea.²⁴

Amount. In legal theory, the amount of insurance which one may purchase is limited only by the full value of his interest in the property. However, in practice, insurance companies generally prefer to insure property for a little less than its full value. In many states "valued policy" laws prevent the insurance companies from showing that the property was insured for more than its true value, in case of total loss, unless fraud or depreciation of the property since the insurance was effected can be shown.

7. Same subject—Time when interest must exist.—In the case of property insurance it is universally agreed that, as a rule, the insured must have an insurable interest in the property when the loss occurs. Furthermore, by the apparent weight of authority, such interest must also exist when the insurance is effected. However, on principle, it is

²³ *New Holland Turnpike Co. v. Farmers' Mut. Ins. Co.*, 122 Pa. 37, 15 Atl. 563, LEADING ILLUSTRATIVE CASES.

²⁴ *New Holland Turnpike Co. v. Farmers' Mut. Ins. Co.*, 144 Pa. St. 541, 22 Atl. 923.

difficult to defend this proposition and many courts and students of the question feel that an interest at the time of insurance should not be requisite. If the insured acts in good faith, there is no reason why the receipt of his fire policy a few days before the deed for his homestead is received should leave him uninsured.

To the rule, if it exists, that there must be an insurable interest when the contract of insurance is effected, the following exceptions are well settled: (1) Floating or running policies are perfectly valid. These cover, for example, constantly changing stocks of goods, or whatever machinery happens to be in a shop when the loss occurs. (2) "Lost or not lost" marine policies are valid. Such policies are used, where, for example, the insurer on June 10th agrees to insure a ship from the first of June, the time when she sailed, whether she is "lost or not lost" before the insurance was effected, if both parties know nothing of what has happened to her between the first and the tenth. Such policies are confined in practice to marine insurance. We generally have no occasion to insure a house "burned or not burned," though such cases might conceivably arise, and such insurance might be held valid.²⁵

It is generally held that the insurable interest need not exist continuously from the time of insurance until the loss occurs. The insurance is merely suspended during the time when the insured has no

²⁵ *Wales v. New York, etc., Ins. Co.*, 37 Minn. 106, 33 N. W. 322; and still more strangely a life was reinsured "dead or not dead" in *Phila. Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250; and accident was covered retrospectively in *Ford v. United States, etc., Relief Co.*, 148 Mass. 153, 1 L. R. A. 700, 19 N. E. 169.

insurable interest and revives when he reacquires an interest.

8. **Insurable interest in lives—Distinctions between property and life insurance.**—A house may never burn but all men must die. Probably most houses never burn, but continue to stand until torn down. But though nothing is more uncertain than the time thereof, nothing is more certain than death. These fundamental facts differentiate property and life insurance.

A further axiomatic truth must be noticed. It is impossible to measure the value of any human life in terms of money. This fact probably had something to do with the common law rule forbidding recovery of damages for causing the death of another. But it is generally not difficult to determine with sufficient accuracy the value of a ship or building.

Hence, property insurance is purely a matter of indemnity, while life insurance has in it the element of investment as well as the feature of indemnity. In theory, a man can never gain through insurance by the loss of his ship or house, unless he practices fraud. But it is perfectly lawful for a woman to insure the life of a worthless husband for a million dollars. His death a few days later means a gain to her in dollars and cents of a million dollars minus the initial premium. In practice, she would have difficulty in getting so much insurance on such a person, but there is no legal obstacle barring her path.

Another difference between property and life insurance is this: The fire insurance companies gen-

erally reserve the right to cancel the policy and return the unearned portion of the premium on giving five days' notice and stipulate that the policy shall be void if the risk be materially increased. Aside from restrictions in regard to extra-hazardous pursuits, such provisions in life insurance policies would be absurd. Though one is at the point of death and can live but a few hours; he has a perfect right to tender his life insurance premium, at least those subsequent to the first, and the company cannot avoid liability by refusing to accept the premium tendered.

Thus, a life insurance policy becomes more valuable as time goes on and the probability of death increases, whereas fire insurance risks remain practically constant because there is virtually no more danger of a house burning when old than when it was first erected.

It may be asked, very properly, how can life insurance companies remain solvent if they charge the same premium each year, as many of them do, without increasing the premium as the risk increases? Such companies are safe because they receive more than enough to cover the risk while the policy holder is young and thus they discount the future.

Relationship. Practically every relationship which can exist through blood, marriage or family ties has been passed upon by the courts and it has been determined in each case, whether or not, for example, one can insure the life of his grandfather or sister-in-law. Whenever the relationship is sufficient to warrant insurance, there appears to be no legal limit

as to the amount of insurance obtainable. This is due to the impossibility of measuring affection.

There are two problems which must be solved in this connection: (1) We must determine whether or not a brother, for example, can insure his sister's life. (2) Assuming such insurance to be proper, we must ascertain if a showing of the mere relationship is sufficient to warrant the insurance, regardless of circumstances. For example, they may be miles apart and, perhaps, have never lived under the same roof.

Husband and wife. There is a presumption that a husband has an insurable interest in his wife's life, and vice versa. The husband is entitled to her services, at least at common law, and she is entitled to his support. But suppose they have been separated for years and that neither support nor services have been received since the marriage. It has been intimated that there is a conclusive presumption in all such cases, regardless of circumstances, though by the probable weight of authority no relationship, however close, will create more than a *prima facie* presumption of the validity of the insurance.²⁶

If the parties are living together but are not legally married, insurable interest may nevertheless exist. The fact and expectation of services or support are sufficient without the right to the same.²⁷

Parent and child. It has been held that a parent may insure the child's life, even though the parent

²⁶ Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 802, 54 L. R. A. 225.

²⁷ Equitable Life Assur. Soc. v. Patterson, 41 Ga. 338, 5 Am. Rep. 535.

has released his right to a considerable share of the child's earnings.²⁸ Had he released his entire interest, the decision might have been against the parent.

In another instance, a son insured the life of his father. The poor law required the son to support his parents if unable to support themselves. It appeared that the son had paid his father's expenses in coming from Ireland. Now it might be argued that the son had a right to get back the passage money by insuring his father's life. But this line of reasoning is clearly erroneous. Insurance must be justified, if at all, by the possibility of loss arising from the death. According to the court, the poor law apparently gave the son no advantage. But the court saw its way out in an ingenious manner. The death of the father may make it more probable that the son will be called upon, under the poor law, to support his mother. Hence, he has an insurable interest in the life of his father.²⁹

Persons in loco parentis. Persons who stand in loco parentis, that is, persons who have conducted themselves as parents by supporting or caring for others, are in the same position as parents in so far as insurable interest is concerned, even though no ties of blood or marriage are present.

Persons under engagement to marry. It is well settled that a woman under engagement to marry may insure the life of her affianced husband. If he refuses to marry her, she may recover damages. If he marries her, she is entitled to support. If he

²⁸ Loomis v. Eagle Life & Health Ins. Co., 6 Gray 396 (Mass.).

²⁹ Reserve Mutual Ins. Co. v. Kane, 81 Pa. 154, LEADING ILLUSTRATIVE CASES.

dies, though she can get neither damages nor support, she will be able to offset these, if she has insured his life, by collecting her insurance.

Commercial relationship. It is well settled that a creditor may insure the life of his debtor, a partner the life of his co-partner, a surety the life of his principal.³⁰ It is rumored that London shopkeepers insured the life of a sovereign about to be crowned in order to avoid loss which would result in the sale of their wares if the monarch had died before the coronation, and that lives of noted financiers have been insured by investors for business reasons. Such cases have not found their way into court as yet.

However, the creditor cannot insure the life of the debtor's wife, if he has no personal claim against her, even though the claim is enforceable against the community property.³¹

Amount of interest. For what amount can the creditor insure the debtor's life? In Pennsylvania it has been held that the creditor is "limited to the amount of the debt with interest, and the amount of the premiums with interest thereon, during the expectancy of life, as shown by the Carlisle tables."³² The inadequacy of such a test is perceived when it is realized that the probable premiums, with interest, always exceed the amount of the policy. How else could an insurance company do business? Like every gambler, the insurance company must arrange to make a "percentage on the game." Applying the

³⁰ *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192.

³¹ *Cameron v. Barcus*, 31 Tex. Civ. App. 46, 71 S. W. 423.

³² *Ulrich v. Reinoehl*, 143 Pa. 238, 13 L. R. A. 433, LEADING ILLUSTRATIVE CASES.

rule suggested, if A owes B a cent, B may insure A's life for a billion dollars, or even more, since the probable premiums with interest must exceed a billion dollars. Probably no more definite rule can be laid down than this: that the amount of the policy must not be greatly in excess of the debt.³³

Interest in one's own life. Outside of Texas,³⁴ one may insure his own life and may designate anyone, though a perfect stranger, as his beneficiary. It is frequently said that a man always has an insurable interest in his own life. It may be urged that such insurance will tempt the favored person to kill the insured, but so does a will devising the insured's property to a stranger. The affection which generally exists in such cases is relied on to outweigh all danger of murder.

Our chief difficulty at this juncture is in determining when A has insured his own life in B's favor, and when B has insured A's life in B's favor. B may induce A to act as B's agent in effecting the insurance and without disclosing the agency, or A may supply B with funds with which to insure A's life in B's favor. It has been decided that if it appears that A took out the insurance, it is immaterial what arrangements may exist between A and B in regard to the payment of the premiums.³⁵

Consent of one whose life is insured. It is held to be contrary to public policy to insure the life of a person who has not consented to the issuance of the policy. In practice such cases occur but rarely,

³³ *Cammack v. Lewis*, 15 Wall. 643 (U. S.).

³⁴ *Equitable Life Assur. Soc. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

³⁵ *Aetna Life Ins. Co. v. France*, 94 U. S. 561.

because it is generally required that the person whose life is insured undergo a physical examination. However, in one case, a policy was issued without the person's consent and without a physical examination where the person had been examined a short time before in reference to another policy.³⁶ The court ordered the policy cancelled.

According to this principle, insurance issued on the life of a king or financier is invalid unless assented to by the king or financier. No exception has been recognized in the case of well-known personages, although, if this kind of insurance is issued to strangers, such consent is, in all probability, not obtained.

Furthermore, it is difficult to see where there is any consent by the one whose life is insured in the case of insurance of the lives of children of tender years, though the issuance of such insurance is a recognized industry. Perhaps the parent's consent is sufficient in such cases.

9. Same subject—Time when interest must exist.—An insurable interest, in life insurance, must exist at the time the policy is issued. It is entirely immaterial, in most jurisdictions, that such interest does not exist when the death occurs.

Thus, where A insured the life of her husband B, then was divorced from B who then married C, while A in the meantime became Mrs. D, it was held proper for A to keep up her payments and collect the insurance on B's death.³⁷

³⁶ *Rombach v. Piedmont Ins. Co.*, 35 La. Ann., 233, 48 Am. Rep. 239.

³⁷ *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, LEADING ILLUSTRATIVE CASES.

There are but two exceptions to this rule: (1) In certain states, a creditor who insures his debtor's life must have the insurable interest when the debtor dies.³⁸ (2) Certain fraternal associations make provision for payment only to persons dependent on a member of the association for support at the time of his death.³⁹

³⁸ See, *infra*, chapter relating to rights of creditors.

³⁹ *Order of Ry. Conductors v. Koster*, 55 Mo. App. 186.

CHAPTER III.

CONCEALMENT, REPRESENTATIONS AND WARRANTIES.

10. **Introduction.**—In the law of insurance, concealment, representations and warranties are closely related, and can be most easily distinguished by illustrations and comparisons.

Suppose that A sells B some flour and conceals the fact that it is unfit for any use. In the law of sales, we say that A is guilty of a breach of an implied warranty, but in insurance law, when A conceals the fact that his house is near a gunpowder factory, we say that he is guilty of concealment. The difference is merely one of terminology. The term “implied warranty” in insurance law is used in another connection, to be noted presently.

Representations are of the same character in the law of sales and in insurance law. They are collateral inducements to the making of the contract, but form no part thereof. Much of the talk preceding a sale or the issuance of an insurance policy is, at most, nothing more than matter of inducement.

Warranties in sales and in insurance are quite different. In many states, if a breach of warranty occurs in the sale of a chattel, the purchaser cannot rescind and demand the return of the purchase money, at least if the seller acted in good faith and

the sale has been executed. To give the purchaser a right to rescind, the term in question should have been made a condition forming a part of the basis of the contract. In the law of insurance, if the insured is guilty of a breach of warranty he cannot recover his insurance even though he has acted in good faith. Hence, it is sometimes stated that all warranties in insurance law are conditions. This statement is misleading, however. The effect of warranties in insurance and conditions in sales is the same. But such conditions are distinguished from warranties in insurance in that insurance companies, when sued on the policy, must plead and prove breaches of warranty and the insured need not allege and prove compliance with all warranties as in the case of conditions.

11. **Concealment.**—A offers B, a perfect stranger to A, a low price for his farm and conceals the fact that the land contains valuable mineral deposits of which A knows that B is ignorant. B accepts the offer. A is not guilty of fraud, in a legal sense, in concealing the value of the land from B. Such parties, as attorneys say, deal at arm's length. But if A had recently been the guardian of B's estate, the rule would be otherwise. If A occupies a position of trust towards B in respect to the land it is A's duty to make full disclosure to B before purchasing.

All insurance contracts resemble the latter class of agreements. The insured must exercise the utmost good faith in procuring a policy of insurance. He cannot recover his insurance if he deliberately conceals a fact, which he knows he should disclose,

on the shallow ground that the company did not ask him about it.

Good faith and materiality. In England, the insured must disclose all material facts in order that he may be entitled to recover his insurance. The fact that he acted in good faith in failing to disclose a material fact is immaterial.

In the United States, this rule is adopted only in marine and not in fire and life insurance. If, in obtaining fire and life insurance, the insured acts in good faith in failing to disclose a fact about which the company has made no inquiry, the insurance company cannot defeat a recovery on this ground. Two reasons for the American rule may be suggested: (1) The company can always examine a man or a house, whereas a ship is frequently insured while at sea and inspection is impossible. (2) The insured who takes out fire or life insurance is compelled to answer such a multitude of questions before he gets his policy that he has a right to feel that he has told all he could possibly know or find out.

A word as to materiality. The insured may conceal from the company his knowledge that his ship was not sighted off Halifax on October tenth, as she should have been. The insurance is effected on the twentieth of October. On the twenty-first, the ship is sighted and is in perfect condition. On the twenty-fifth, she is lost in a gale. The insured cannot recover, because of material concealment. Whether or not a fact is material is determined solely by the situation at the time the contract of insurance is made. The subsequent course of events is of

no consequence in this respect. Had the insured disclosed his information he might have been unable to obtain insurance, or, he would probably have been charged a higher premium.⁴⁰

Special inquiries. Failure to make full disclosure in answer to a question put to the insured by the company avoids the policy, unless the company waives the right to a complete answer. If inquiry be made, the insured cannot willfully conceal his knowledge on the ground that the matter is of no consequence and that the company should not have asked the question.

Assume that the question is, What mortgages on the property exist? An answer that the property is mortgaged to X for a thousand dollars, when there is also another mortgage, entitles the company to avoid the policy. But if the question asks for the amount of the mortgage, if any, an answer that the property is mortgaged without disclosing the amount is incomplete on its face. If the company proceeds to issue the policy without objecting to the answer, it cannot then avoid its contract on the ground of concealment.⁴¹ We may say that in the first answer there is a latent, in the second a patent lack of responsiveness.

Termination of duty to disclose. The duty to disclose ends as soon as the contract is complete, even though the policy is not issued until several weeks later, or even though the policy is never issued. It is interesting, in this connection, to contrast the

⁴⁰ *Lynch v. Dunsford*, 14 East 494 (Eng.).

⁴¹ *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, LEADING ILLUSTRATIVE CASES.

delivery of a conveyance of real estate with the delivery of an insurance policy. The legal title to real estate cannot pass by act of the parties until a duly acknowledged deed has been delivered to the grantee. Such grantee may then, by his own deed, pass on the legal title to a third party. On the other hand, an insurance contract need not be reduced to writing and a person insured does not generally contemplate transferring his rights to a third party, and even if he does, a new policy must frequently be issued and the old one delivered up and cancelled.

Duties of agents. Three well-known cases involving the duty of the insured's agent to make disclosure have been adjudicated.

In the first of these,⁴² the master of a vessel purposely delayed sending the news of the loss of the ship, so that the owner might have time to effect insurance. The United States Supreme Court allowed a recovery on the theory that the instant the ship was lost, the master ceased to be the agent of the insured and that insuring the vessel did not fall within the scope of the master's duties.

The decision was criticized and contradicted by later English authority.⁴³ However, the House of Lords twenty years thereafter said, virtually, that the American decision is perfectly sound as far as insurance law is concerned if the assumption in reference to the termination of the agency is correct, though the holding in this regard is not very satisfactory.⁴⁴

⁴² General Int. Ins. Co. v. Ruggles, 12 Wheat. 408 (U. S.).

⁴³ Proudfoot v. Montefiore, L. R. 2 Q. B. 511 (Eng.).

⁴⁴ Blackburn, Low & Co. v. Vigors, 12 App. Cas. 531 (Eng.).

12. **Representations.**—Certain distinctions between representations and warranties must be noted: (1) Representations are but collateral inducements to the making of the contract. Warranties, in insurance, are agreed upon as essential parts of the contract. (2) Representations may be purely oral. Warranties must appear on the face of the policy or be incorporated therein by reference. (3) To avoid the policy, representations must be material. Warranties are deemed, conclusively, to be material. (4) Representations are required to be only substantially true. Warranties must be strictly complied with.⁴⁵

Between concealment and representations we find no difference in so far as materiality is concerned. Both must be material in order that they may be of any consequence. However, though good faith protects the insured in this country, if there is concealment of a material fact in obtaining fire or life insurance, good faith is never a defense where one is guilty of misrepresentation.

Matters of opinion. Suppose that the insured is asked if he is of temperate habits. In many such cases an affirmative answer has been given though the insured suffered from an occasional attack of delirium tremens caused by excessive drinking. There are two difficulties here. The person might honestly believe himself temperate. Furthermore, there are so many views as to what constitutes temperance. Though a variety of decisions has been handed down on this question, it is interesting to

⁴⁵ *Pawson v. Watson*, 2 Cowper 785 (Eng.).

note that the United States Supreme Court allowed the insurance money to be recovered in a case of this character.⁴⁶

In numerous cases where one states that he is not afflicted, for example, with Bright's disease, recovery has been allowed. The theory on which recovery is allowed is that there is here no misrepresentation, and what was said is true if all that is desired is an expression of opinion. However, one may state as a fact that which he does not know to be true, but only believes, and if he does state it as a fact its falsity is ground for avoiding the policy.⁴⁷

Promissory representations. The term "promissory representation" applies to representations that certain conditions will be brought about in the future. We may lay it down as a rule that such representations are like snakes in Ireland. They do not exist. (1) If the statement is in the policy, it is not a mere representation but an essential part of the contract. (2) If not in the policy and the policy has been received, the parol evidence rule prevents the insurance company from showing it. To this rule there are these exceptions: by statute in certain states statements in the policy are made representations; fraudulent misrepresentations may be shown by parol testimony.

Materiality. Whether or not a representation is material is a question of fact generally left to the jury for determination. In several states it is enacted by statute that representations shall not be

⁴⁶ *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350.

⁴⁷ Lord Mansfield in *Fillis v. Brutton*, 1 Park. Ins. 8th ed. 414 (Eng.).

deemed material unless the matter misrepresented actually contributes to the loss. According to this rule, apparently, if a man represents that the walls of his frame house are of stone, he can recover his insurance if the house burns, even though insurance rates on stone houses are much lower than on frame dwellings, unless the company can show that if the walls had been stone the house would not have burned or that the loss would not have been so great.

13. **Warranties.**—We have learned that though representations must be but substantially true, warranties must be strictly complied with. However, a rule of construction adopted by the courts has assisted insured persons in this regard. The courts are very reluctant to decide that a given statement is a warranty. It has been said that there must be no room for any other construction.⁴⁸ And in determining the exact matter warranted the courts are equally strict. For example, it has been held that where one warrants that smoking is not allowed on the premises he is making a statement only as to the existing rules and he himself may, in the future, smoke in the building with impunity.⁴⁹

Promissory warranties. Unlike promissory representations, it is well settled that warranties may look to the future. For example, one may and frequently is required to agree to keep an iron fireproof safe on the premises, or, not more than a certain amount of gasoline. Nevertheless, as illustrating the courts' reluctance to expand warranties and

⁴⁸ Insurance Co. v. Woods, 54 Kan. 663.

⁴⁹ Hosford v. Germania Fire Ins. Co., 127 U. S. 399.

their anxiety to restrict them, it has been held that where the insured declared "that he does not now, nor will he, practice any pernicious habit," *declaring* is not the same as promising and that no promissory warranty had been made, though the insured soon drank to excess and in consequence died from an attack of delirium tremens.⁵⁰

Description. Though the insured agrees to warrant all statements contained in his application, the fact that he calls himself John T. Smith instead of John F. Smith would certainly not avoid the contract, unless a mistake in identity resulted.

Accordingly, it was held that calling a ship the "Three Sisters" is not a warranty that the ship is English and the insured may recover though she is a Spanish vessel and her name in Spanish is "Tres Hermanas."⁵¹

Materiality. When a matter is warranted, the insured cannot recover even though he can show that the matter is immaterial. Thus, where a vessel was warranted to navigate only in inland waters, but went to sea, then came back unharmed and was later lost in inland waters, no recovery could be obtained.⁵² And therein lies the virtue of warranties from the insurance company's standpoint. It might have been impossible to show that the ship was rendered more liable to sink through going to sea. A warranty relieves the company of this necessity.

Statutory changes. In several states, statutes have abolished the distinctions between representations

⁵⁰ Knecht v. Mutual Life Ins. Co., 90 Pa. 118.

⁵¹ Clapham v. Cologan, 3 Camp. 382 (Eng.).

⁵² Cogswell v. Chubb, 1 N. Y. App. Div. 93.

and warranties by providing that a breach of warranty is no defense unless it is material, or unless fraud appears. Such statutes virtually make all warranties representations in so far as protection to the insurance companies is concerned.

Implied warranties. It is only in marine insurance that we find the term "implied warranty." The term apparently contradicts what has been said in regard to the necessity of warranties appearing on the face of the policy. However, these so-called implied warranties are really conditions to the attachment of the risk, rather than true warranties.

For example, it is said that in a voyage policy there is an implied warranty that the ship is seaworthy for the purpose of the voyage insured and that if she is unseaworthy, the risk does not attach even though nothing is said about seaworthiness in the policy. This is the same as saying that such seaworthiness is a condition precedent to the policy's going into effect.

CHAPTER IV.

SUBROGATION.

14. Introduction.—Subrogation is a general principle recognized in courts of equity. In many instances the court of equity will substitute one person, X, in the place of another, Y, to whose rights against a third, Z, X thereby succeeds. The simplest case is that wherein a surety upon paying the claim of his principal to the creditor succeeds to the creditor's rights against the principal. A misuse of terms is frequently made by law students in saying that X subrogates Y's rights against Z. The student should say that X is subrogated. The court, by its decree, subrogates him.

The doctrine of subrogation as applied to insurance may be stated as follows: When the insured has, irrespective of the insurance, a legal right to compensation from another, such right being of such a character that the insured might receive more than indemnity upon the occurrence of the event insured against, the insurer, upon indemnifying the insured, succeeds to this right.

15. Property insurance.—We will consider, first, the application of the doctrine of subrogation to property insurance, which includes particularly fire and marine insurance.

16. Same subject—Is the right contractual or equitable?—Though the right of subrogation may be

modified or even destroyed by contract,⁵³ the right arises not out of the contract between the insured and the insurer but has its origin in general principles of equity. Though it is frequently provided in the contract that the right shall exist, it may exist without such a provision.⁵⁴

The difference between purely contractual rights and this right can be readily illustrated. If R negligently burns F's house, F probably could not, by contract, assign his claim against R to C. Nevertheless, C, if an insurance company, may, by virtue of the doctrine of subrogation, succeed to F's rights against R.⁵⁵

17. Same subject—The insurer claims through the insured.—The insurer in asserting the right of subrogation claims through the insured and never acquires rights against the wrongdoer superior to those of the insured. Thus, where F lost a house and shop by a single fire caused by R's negligence, and then, through mistake of counsel, sued and recovered damages for the loss of the shop, without including the house, it was then too late for C, the insurance company, upon paying the insurance value on the house, to sue R for damages to the house. Since R has a good defense, *res adjudicata*, against F, he has the same defense against C.⁵⁶

In like manner, where F owned two ships, A and B, which collided through the negligence of the pilot

⁵³ See § 22, entitled "Right as affected by acts of the insured."

⁵⁴ The rule to the contrary in Massachusetts is law in no other state. *King v. Watertown Fire Ins. Co.*, 132 Mass. 480.

⁵⁵ *Railroad Co. v. Neet*, 7 Kan. App. 495.

⁵⁶ *Trask v. H. & N. H. Railroad Co.*, 2 Allen 331 (Mass.).

on A, even though the owners of cargo on B could sue F, as the owner of A, the insurance company on paying the insurance in respect to injury to B cannot then sue F, as owner of A, and thus decoy the money back on the pretext of subrogation. F, as owner of B, had no right to sue himself as owner of A. Lord Blackburn declared very properly that a right of action cannot be transferred unless it already exists, and that by paying the insurance money no fresh right is created.⁵⁷

One further word in regard to this case is necessary. The reader may not know that the negligence of the insured in causing the loss does not excuse the insurance company from liability.

18. Same subject—Nature of the right of the insured against the third party.—Suppose that, through no one's fault, a farmer, F, loses his barn in a fire. His neighbors fail to put out the fire, but, out of sympathy, take up a collection and donate the proceeds to F, who deposits this sum in a bank and then collects insurance which fully indemnifies him. Can the insurance company, C, then claim subrogation to this fund in the bank? Clearly not.⁵⁸ There can be no subrogation unless F had a legal right to compensation against his neighbors. It is assumed that he did not.

At the other extreme we find cases in which the third party is absolutely liable. For example, by statute, railroads have been made liable, in certain states, for fires caused by their engines, though free

⁵⁷ *Simpson & Co. v. Thomson*, 3 App. Cas. 279 (Eng.).

⁵⁸ *Burnand v. Rodocanachi*, 7 App. Cas. 333 (Eng.).

from negligence. It has been suggested that if there is to be any subrogation in such cases, the railroad should be subrogated to the insured's rights against the insurance company. However, the rule is the reverse of this.⁵⁹ The insurance company, on indemnifying the insured, is subrogated to the latter's rights against the railroad.

Not only must the third party be legally responsible to the insured, but the liability must arise out of the loss. For example, X fraudulently represented a house to be worth \$10,000, and thereby induced F to buy it. F then insured it. After the fire it was held that the insurer could not claim subrogation to F's rights against X.⁶⁰ The decision is based on the ground that X's liability did not arise out of the loss; that his language, however pernicious, did not cause the house to be destroyed. Had X intended to deceive the insurer into issuing a \$10,000 policy, and had he succeeded, the court might have recognized an independent right of the insurer to sue for deceit.

There is but one exception, which must be noted, to the doctrine that the right must arise out of the loss to entitle the insurer to subrogation. If A, a mortgagee, insures the mortgaged property for his sole benefit,⁶¹ the insurer upon paying to the mortgagee, in case of loss, the full amount of the mortgage, becomes subrogated to the rights of the mortgagee

⁵⁹ *Mathews v. St. Louis & S. F. R. Co.*, 121 Mo. 298, 25 L. R. A. 161.

⁶⁰ *Farmers' Fire Ins. Co. v. Johnston*, 113 Mich. 426, 71 N. W. 1074.

⁶¹ The rule which follows does not apply if the insurance is for the benefit of both mortgagor and mortgagee. See a subsequent chapter in regard to the rights of beneficiaries.

against the mortgagor under the mortgage.⁶² Here it is clear that the mortgagee's rights do not arise out of the loss, that the mortgagor has not committed a tort and that the mortgagee's right against the mortgagor is purely contractual. Nevertheless, it is well settled that subrogation exists.

However, certain decisions in New York leave us in doubt as to how far we may go in allowing the insurer to be subrogated to rights which exist solely by virtue of a contract between the insured and the third party.⁶³

In one of these cases,⁶⁴ the insurance covered uncompleted buildings for which the insured was not compelled to pay the contractor until completion. The buildings having burned before completion, the New York court, in an action by the insured against the insurer, declared that the insurer could not "resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy."

19. Same subject—Nature of the insured's right against the insurer.—Let us modify the first illustration in the last section. Let us assume that the insurance company donates to the owner a sum equal to the value of the barn destroyed. This situation might arise where, through the act of the insured in keeping dynamite on his premises, he is unable to enforce the payment of his insurance. We may assume that R negligently caused the fire. Is there

⁶² This is the common law rule outside of Massachusetts.

⁶³ *Michael v. Prussian Nat. Insurance Co.*, 171 N. Y. 25, 63 N. E. 810, LEADING ILLUSTRATIVE CASES.

⁶⁴ *Foley v. Manufacturers', etc., Insurance Co.*, 152 N. Y. 131, 43 L. R. A. 664.

subrogation here? It is a well-settled principle in equity that a mere volunteer, one who was not compelled to pay, is not entitled to subrogation.

However, it is equally well settled that, where insurance has been effected, the insurance company upon indemnifying the insured is entitled to subrogation against a wrongdoer who causes the loss, even though the insurer might have recovered judgment by pleading some defense when sued on the policy by the insured.⁶⁵

In one case the tort-feasor defended himself on the ground of contributory negligence. He contended that the insurance company was guilty of contributory negligence in assuming the risk. But the court promptly rejected the plea.⁶⁶

20. Same subject—Confusion due to other principles.—The most intricate case of subrogation in insurance law is *Castellain v. Preston*.⁶⁷ Preston owned a building which he insured with Castellain, or at least, for our purpose, we will call Castellain the insurer, though in fact he merely represented an insurance corporation. Preston made a contract for the sale of the premises to Rayner under such circumstances that, in equity, Rayner was compelled to pay the full purchase price though the property had been destroyed by fire, and although the legal title had not been conveyed. Castellain, in ignorance of the contract of sale, paid the insurance money to

⁶⁵ *United States v. Amer. Tobacco Co.*, 166 U. S. 468, LEADING ILLUSTRATIVE CASES.

⁶⁶ *U. S. Casualty Co. v. Bagley*, 129 Mich. 70, 55 L. R. A. 616.

⁶⁷ *Castellain v. Preston*, L. R. 11 Q. B. D. 380 (Eng.), LEADING ILLUSTRATIVE CASES.

Preston immediately after the fire. Here was where Castellain may have made a mistake. In many cases the change of title in Preston would have avoided the insurance. However, after the money had been paid, Rayner sued Preston and contended that the insurance money should either be paid to Rayner or applied towards reinstating the buildings. Rayner was denied relief, though a dissenting judge was of the opinion that the money should be held in trust for Rayner.⁶⁸ A Maryland court has decided in accordance with the views of this dissenting judge,⁶⁹ and the English decision appears to be erroneous on principle.

However, the rather surprising rule laid down in *Rayner v. Preston* made the decision in *Castellain v. Preston* inevitable. The court held that *Castellain* was entitled to subrogation to Preston's right under the contract of sale so that *Castellain* might recover thereunder to the amount of the insurance.

This decision appears to be sound, if *Rayner v. Preston* is correct. But if we agree with the Maryland court, the situation in *Castellain v. Preston* cannot arise.

Similar confusion probably existed in the mind of the losing counsel in another case. F shipped a box over the R railroad and C insured it. The box was destroyed by fire through no fault of R, but, under common law rules, R was nevertheless liable. C paid F and then claimed subrogation to F's rights

⁶⁸ *Rayner v. Preston*, L. R. 18 Ch. D. 1 (Eng.), LEADING ILLUSTRATIVE CASES.

⁶⁹ *Skinner, etc., Co. v. Houghton*, 92 Md. 68, 48 Atl. 85.

against R. R's counsel contended that the doctrine of subrogation was inapplicable here; that a common carrier is himself an insurer and that, in any event, R was at most a co-insurer along with C, and was not liable for more than half the loss. The court very properly disagreed. A common carrier, under ordinary conditions, is not an insurer. More accurately, we should say that he is merely liable as such.⁷⁰

21. Same subject—When does the right accrue?
—One of the fundamental rules of subrogation is this: There can be no subrogation until indemnity is complete. For example, a mortgagee holding a thousand dollar mortgage insures the property for his sole benefit in the sum of five hundred dollars. Then a fire occurs causing a loss of three hundred dollars. The insurance company can claim subrogation to the rights of the mortgagee against the mortgagor under the mortgage, but not upon paying three hundred dollars, the amount of the loss; nor yet five hundred, the amount of the policy; but only on payment of a thousand, the amount of the mortgage, since only then will the mortgagee's claim against the mortgagor be fully satisfied. Thus, the insurer must either pay a full thousand and demand immediate subrogation, or pay three hundred and wait until the mortgagee has received seven hundred from the mortgagor and then make the demand.⁷¹

Because of principles to be explained in the next section we should, perhaps, for the sake of accuracy,

⁷⁰ Hall & Long v. The Railroad Co., 13 Wall. 367 (U. S.), LEADING ILLUSTRATIVE CASES.

⁷¹ Phoenix Ins. Co. v. First Nat. Bank, 85 Va. 765, 8 S. E. 719, LEADING ILLUSTRATIVE CASES.

say that an imperfect, or conditional, right of subrogation, which the insured must respect, arises as soon as the loss occurs, but that the right is not enforceable directly until the insured's indemnity is complete.

22. Same subject—Right as affected by acts of the insured.—At three different times the insured may affect, or attempt to affect, the insurer's right of subrogation: (1) before the loss; (2) after the loss, but before the insurer settles; (3) after the insurance company settles.

Before the loss. The most common situations, wherein the insured has affected the right of subrogation before the loss, have been cases in which goods have been shipped by common carrier, X, and insured by the shipper, F, with an insurance company, C. In such cases the bill of lading issued by X may provide that X shall have the benefit of any insurance effected by C, or, the policy issued by C may expressly provide that the insurer shall be entitled to subrogation against the carrier if the carrier becomes liable to F for the loss of the goods, and that if F in any way interferes with the right of subrogation, the policy shall be void; or both provisions may appear. If the bill of lading provides that X shall have the benefit of any insurance, but the policy says nothing on the subject, C must pay the insurance and cannot obtain subrogation.⁷² X is relieved entirely if the property is fully covered by insurance, and pro tanto if the property is more

⁷² *Wager v. Providence Ins. Co.*, 150 U. S. 99, LEADING ILLUSTRATIVE CASES.

valuable.⁷³ If the bill of lading says nothing, but the policy expressly provides for subrogation, such provision is entirely superfluous. The right would exist even in the event that there were no such provision.

However, cases have arisen in which both provisions appeared. Three possible decisions may be reached. F may be allowed to recover from X, or from C, or from neither. It has been held that where it was provided in the policy that C should not be liable, F cannot recover from C.⁷⁴ But in such a case it has been held that F can recover from X, in full, on the theory that there is no insurance of which X can receive the benefit.⁷⁵ Even if C voluntarily pays F on condition that C shall have the right to proceed against X, X cannot complain and is liable for the loss.⁷⁶ Then a case might arise in which F could not recover from either X or C, but no such case is reported.

After the loss, but before settlement by the insurer. After F's house is burned by R's negligence and before the insurer, C, pays anything to F, F may release R from all liability. Though such a release destroys the right of subrogation, C is thereby discharged to the extent of the value of F's right against R.⁷⁷ But suppose that C pays the insurance money to F in ignorance of the release of R. It is clear that F can be compelled to pay back the insurance

⁷³ *The Sidney*, 23 Fed. 88.

⁷⁴ *Fayerweather v. Phenix Ins. Co.*, 118 N. Y. 324, 6 L. R. A. 805.

⁷⁵ *Inman v. S. C. Ry. Co.*, 129 U. S. 128.

⁷⁶ *Southard v. Minneapolis, St. P. & S. M. Ry. Co.*, 60 Minn. 382, 62 N. W. 442, LEADING ILLUSTRATIVE CASES.

⁷⁷ *Atlantic Ins. Co. v. Storrow & Boyd*, 5 Paige 285 (N. Y.).

money to C.⁷⁸ However, if F has absconded, which of the two innocent parties, R or C, should bear the loss if both were free from negligence? On principle, the loss should fall on C, who had but an equitable right of subrogation, which was cut off by the release of R.

After payment by the insurer. Upon fully indemnifying the insured for his loss, it is clear that C is entitled to subrogation to the rights of F against R. Assume that after C thus settles with F, R purchases a release from all liability from F. If the release is purchased by R with full knowledge of C's rights, it in no way affects the right of C against R by virtue of subrogation.⁷⁹ But if the release is purchased without the knowledge of the rights of C, the rights of C against R are destroyed. This is true because R is then in the position of a bona fide purchaser of a release of a legal right against himself from F who holds the claim in trust for C, C being in the position of a cestui que trust whose equitable interest has been cut off as against an innocent purchaser.⁸⁰

23. Same subject—Amount of recovery.—The right of subrogation is limited to the amount which the insurer is compelled to pay. It would be as unjust and as dangerous to allow insurance companies to profit by fires as it would be to allow such a gain to be made by the insured.

In many, if not in most, cases the property is insured for less than its full value. It is then merely a matter of procedure to arrange for an action in which

⁷⁸ Chickasaw, etc., Ins. Co. v. Weller, 98 Iowa 731, 68 N. W. 443.

⁷⁹ Hart v. Western Ry., 13 Metc. 99 (Mass.), 46 Am. Dec. 719.

⁸⁰ Same case, at page 106.

the three parties shall be fully represented. If the insured is unwilling to sue the third party, the insurer has no difficulty, today, in being permitted to sue either in his own name, or at least in the name of the insured for the benefit of the insurer.

Assume that, by statute, a railroad is liable for treble damages if grossly negligent in causing a fire, and that insured property has been destroyed in this manner. Here someone is going to get a windfall. Shall it be the insurance company or the insured? The court in Maine felt that it should be the insurance company after it has indemnified the insured.⁸¹

24. Life insurance.—A creditor has insured his debtor's life for \$1,000 and the amount of the debt is also \$1,000. Then the debtor dies and the insurer pays the insurance to the creditor. Shall the insurer be subrogated to the creditor's right to collect \$1,000 from the debtor's estate? From what we have already learned in this chapter as to the subrogation of an insurer to the rights of a mortgagee, one might conclude that subrogation would be allowed here.

However, it is unanimously agreed that the doctrine of subrogation has no application to life insurance.⁸² Both satisfactory and unsatisfactory reasons for this rule have been offered.

First, it has been said that where a life insurance company seeks subrogation to the right of the insured's personal representative or next of kin to recover damages for death by wrongful act, the right to damages is purely statutory and at common law

⁸¹ Rockingham, etc., Insurance Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618.

⁸² Conn. Mut. Life Ins. Co. v. N. Y., N. H. & H. R. R. Co., 25 Conn. 265,

it did not exist because the cause of action died with the person. However, in a multitude of cases of property insurance, subrogation is allowed though the right against the third party is statutory; for example, where a railroad is made absolutely liable for fires caused by its engines even though it has not been negligent.

Another argument advanced is that even by statute no right in the insured exists to recover for death by wrongful act, and that the right is given only to members of his family or his kin. Though this is true as to most of these statutes, a few of them provide that the cause of action shall survive and be handled as if the deceased were alive. Thus they allow a recovery by the administrator for the pain of the deceased.⁸³ In such a case the right of action might be regarded as residing in the insured or as part of his estate.

A further argument is this, that life insurance is a matter of investment and not indemnity. However, in the case of a creditor insuring his debtor's life for a term of years, the element of indemnity is practically the sole feature.

There would, however, be this practical difficulty in allowing subrogation. It would be necessary to determine the exact value of a human life. This might prove embarrassing to the family of a worthless person, but not more so than such a controversy in an action for death by wrongful act.

25. Accident insurance.—F has his right leg insured for \$1,000. He loses it in a railroad wreck and then recovers \$1,000 from the railroad company.

⁸³ *Quinn v. Johnson Forge Co.*, 9 Houst. 338 (Del.), 32 Atl. 858.

Shall we allow him to recover \$1,000 from the insurer as well as from the tort-feasor? Would this be unjust enrichment? Regardless of what one's opinion may be, it has been decided that there can be no subrogation in accident insurance.⁸⁴ The court reasoned that so far as subrogation is concerned, accident insurance resembles life rather than property insurance. But that was the very question for the court to decide. Is it true that, in general, accident insurance resembles life rather than fire insurance? We might argue just the other way. A man must die, but his house need never burn. There is no necessity for losing one's legs. Most men do not.

But even if subrogation is allowed, the insurance company might have difficulty in asserting the right to any advantage, because the insured is really never fully indemnified for the loss of a part of his body or for an injury. The insurance company might contend that the judgment in an action by the insured against the tort-feasor conclusively determines the amount of the injury. However, the rule is the other way. Such a judgment is, at most, but evidence in the insurer's favor.⁸⁵

26. Indemnity insurance.—Indemnity insurance is but a commercialized form of suretyship, and it was in the law of suretyship that the doctrine of subrogation arose and developed. Hence there is no question but that an indemnity insurance company on indemnifying a creditor may assert subrogation to the creditor's rights against the debtor.

⁸⁴ *Aetna Life Ins. Co. v. Parker & Co.*, 96 Tex. 287, 72 S. W. 168.

⁸⁵ *Aetna Insurance Co. v. Confer*, 158 Pa. St. 598, 28 Atl. 153.

CHAPTER V.

WAIVER AND ESTOPPEL.

27. **Waiver and estoppel distinguished.**—Though closely allied it is possible in most cases to distinguish waiver from estoppel. Take a case in agency. A merchant has in his employ an agent to collect bills each month from certain customers. Suddenly the agent is discharged, but the merchant does not give his customers notice of the discharge. The customers, in ignorance of the discharge, pay the discharged agent, as usual, the next month. The agent then absconds. The loss falls on the merchant.

Have we here a case of waiver or estoppel? Shall we say that the merchant had a right to give notice to the customers, but that by failing to do this he waived his right to cut off the agent's ostensible authority? Or shall we say that the merchant, by his failure to give notice, has misled the customers and is now estopped to deny the authority of the agent? The latter statement is the customary one, for the former would have a strange sound in the ears of a lawyer.

Waiver. By waiver we mean the relinquishment of a right. For example, the policy may provide that if the insured keeps dynamite on the premises, the policy shall be void. The insurance company, after the issuance of the policy, may tell the insured

that he may keep dynamite in his house for six months. This is a waiver of the company's right to declare the policy void on this ground.

But the over-zealous student of contracts may contend that the promise of the insurer to allow this is unenforcible, because it is not supported by consideration. We must remind him that the law of contracts requires consideration only in the making of a contract, not in the waiving of some particular right thereunder.⁸⁶ At least, such is the holding in quite a few insurance cases.⁸⁷ However, several courts have held that the insurance company's waiver is of no effect unless supported by valuable consideration or accompanied by the element of estoppel.⁸⁸

Waiver is frequently defined as the voluntary or intentional relinquishment of a right with knowledge of its existence. What is meant by voluntary or intentional? It is a matter of frequent exasperation to an insurance company, after it has carefully drawn up a policy forbidding dynamite on the premises, to find the court saying that by telling the insured that he could do some blasting on the premises, the insurer has waived its right to object to the dynamite. But, the insurer rejoins: "We said nothing about dynamite and neither voluntarily nor consciously waived this dynamite provision." Then the court, in surrejoinder, declares that, dynamite being incidental and necessary in blasting, the insurer waived its right to forbid the dynamite by allowing the

⁸⁶ *Schwartz v. Wilmer*, 90 Md. 136, 144; 44 Atl. 1059. However, a conflict of opinion on this question must be admitted.

⁸⁷ *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111.

⁸⁸ *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362.

blasting. It can hardly be said in this case that the insurer was conscious of the relinquishment.

Then, as to its being the relinquishment of a known right, we must recall the maxim that every man is presumed to know the law. The maxim should, perhaps, read: "Ignorance of the law excuses no one." In either form it applies here. We may say that when the insurance company accepts a premium which it knows is past due but in ignorance of its right to reject it because of the tardiness in payment, it is presumed to know its rights or that its ignorance is no excuse. Hence, when we speak of a known right here we do not mean that the company knows the law applicable to the case. However, there can be no waiver without a knowledge of the essential facts as distinguished from the law on which the situation is based. Accordingly, where an insurance company accepted premiums in ignorance of the fact that the insured had been living farther south than the policy permitted, it was held that no waiver had occurred, and that the insurance could not be recovered.⁸⁹

Estoppel. Estoppel arises when one by his conduct so misleads another, that the former is not permitted, or, as we say, is estopped from asserting a right which he might otherwise assert. In theory, the person estopped still has the right but cannot assert it. There is really but little difference between having a right which one cannot assert and losing it. Thus, when the insurance company assures the insured that his policy is still in force and thus mis-

⁸⁹ *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326.

leads him into the belief that he has insurance and need not procure other insurance, the company cannot thereafter deny that its policy was in force at the time when its assurance was given. The essential elements of estoppel are: (1) conduct calculated to mislead; (2) reliance upon such conduct by one having a right to rely thereon; (3) to the prejudice or damage of the party misled.

We must not get the cart before the horse. There is no reason for an estoppel if (2) comes before (1). However, there is a dictum in an Indiana case which sanctions the coming of (2) before (1).⁹⁰ Where the insured had sixty days in which to file his proofs of loss, it is intimated that, if the company accepts them after the sixty days are past, it may then be held estopped to assert that the proofs were not filed in due time. How can one be misled into doing something after he has already done it? *Ex post facto* and retrospection are terms that are familiar to every law student. However, they are conceptions which are out of place here.

Implied waivers. When we come to implied waivers, we find ourselves in a twilight zone in which the distinction between waiver and estoppel practically disappears.

“While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either; for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has

⁹⁰ *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921.

misled the insured into acting on a reasonable belief that the company has waived some provision of the policy.”⁹¹

This language justifies us in saying that in every case of estoppel, the insurer has impliedly waived its rights.

It must not, however, be supposed that all waivers are implied. Many are express. Every day the insurance companies paste little slips of paper on policies which have been already issued. Such slips are known as “riders” and provide, for example, that the insured shall have the privilege of leaving his house vacant for a longer time than that allowed in the printed policy.⁹²

What are the elements necessary to constitute an implied waiver? One might conclude that they are the same as those at the basis of the doctrine of estoppel in insurance and in other branches of the law. However, the decisions of many courts appear to justify us in saying that the insured need not show the second element of estoppel in order to prove an implied waiver. That is, he need not show that he was actually misled.

For example, the insurer may have sent the insured notice of premiums due for a sufficient number of times so that the court would hold that the insurer has impliedly waived its right to insist upon payment without notice. Suppose that the insurer could show that the insured was bankrupt and utterly unable to pay his premium even if notice had been

⁹¹ Quoted in the case last cited.

⁹² *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906.

sent. Such evidence would be rejected by many courts.⁹³

Furthermore, many courts have held that mere silence on the part of the insured may be sufficient conduct to mislead, and such decisions appear perfectly sound because, it is submitted, in this connection a contract of insurance is one which undoubtedly requires the exercise of the utmost good faith on both sides.

For example, many courts have held, very properly, that where the policy provides that it shall become void if other insurance is taken out without the insurer's consent, there is a duty resting on the insurer, when it is notified of such other insurance, to inform the insured of its intention to declare the policy void and that, if it does not, it impliedly waives its right.⁹⁴

28. Parol waivers of rights under the policy—Parol evidence rule.—In many cases, the policy provides, for example, that a groceryman shall keep an iron fireproof safe for his books on his premises, and that if he does not, the policy shall be void. The groceryman confers with the duly authorized agent of the company and the agent informs him that a good, strong tin box is sufficient. The store burns and the groceryman sues on the policy. The company then sets up the iron safe clause as a defense. At the trial, the insured proposes to show the conversation with the agent. The company objects to the evidence

⁹³ This is the principle recognized in *Weiss v. American Fire Ins. Co.*, 148 Pa. 349, 23 Atl. 991.

⁹⁴ *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339, **LEADING ILLUSTRATIVE CASES**.

on the ground that the parol evidence rule forbids the introduction of parol testimony to vary the terms of a written instrument. Let us assume that the court sustains the objection.

Does this leave the groceryman without remedy? It is the rule everywhere that it does not. The groceryman may dismiss his action at law on the policy and file a suit in equity and can, in many instances, obtain from the court of equity a decree reforming the contract so that it will correspond to the actual agreement of the parties. Such relief may be obtained on the ground of fraud or mutual mistake of fact.

If this is true, then why have persons appealed their cases even to the United States Supreme Court, in actions on the policy, in their efforts to have such parol evidence admitted in their actions at law, when they might have saved time and expense by dismissing their actions at law and bringing new suits in equity for reformation? The chief reason, undoubtedly, is this: that in equity the plaintiff cannot demand a jury as a matter of right, and in many cases of this kind the court will decide the matter without the aid of a jury. On the other hand, in an action at law, the plaintiff may demand a jury as a matter of right, in most cases. This he would generally do because he has good reason to feel that he has a better chance to recover if there is a jury, particularly if his case is of doubtful merit. Furthermore, the plaintiff must prove his case only by a preponderance of the evidence in an action at law. In a suit in equity for reformation he will get no relief

unless he establishes his case by evidence which is clear, unequivocal and convincing.”⁹⁵

Perhaps nowhere else in the law of insurance is there so much confusion as upon the exact question which we are about to consider, and, curiously enough, there are virtually no English insurance decisions to guide us. The question is, When may oral testimony be introduced in an action at law to contradict the terms of the policy?

29. Same subject—Waiver prior to the delivery of the policy.—Insurance policies are instruments of considerable dignity, not because of the gorgeous emblems and other ornamentations which so frequently appear on the face of them, but because a policy is not generally, and should never be issued until after all preliminary negotiations have been completed. Such preliminary matters are deemed superseded entirely and of no validity as evidence, at law, after the delivery and acceptance of the policy, into which all prior understandings become merged.

Accordingly, it appears to be pretty well settled that in an action at law on the policy, the insured cannot show, by parol evidence, an agreement which he had with the company, prior to the acceptance of the policy and in contradiction of the terms of the policy.

Therefore, where a policy provided for the forfeiture of the insurance on failure to pay a premium when matured, it was held that the plaintiff could

⁹⁵ United States v. Budd, 144 U. S. 154; Northern Assur. Co. v. Grand New Bldg. Assn., 203 U. S. 106.

not show that the company had promised, before the delivery of the policy, that the premiums need not be paid promptly.⁹⁶ The court declared that the entire agreement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be stated in the policy and that, until corrected by refutation in a court of equity, the policy must be taken as expressing the final understanding of the insured and of the insurance company.

30. Same subject—Waiver at the time the policy is delivered.—It would be difficult to prove that the weight of authority accords with the rules about to be stated in reference to the admissibility, in an action at law on the policy, of parol evidence in regard to matters existing at the time the policy is delivered, for the purpose of contradicting the terms of the insurance policy. Nevertheless, it would be equally difficult to prove the contrary.

However, the rule about to be stated is comparatively easy to apply and, if not a true statement of the prevailing principles, we must be forced to admit that there are no general rules on the subject, or that each jurisdiction has its own rules. The suggestion, which has been made, that insurance policies should not be protected by common law rules, smacks of unfairness and cannot be supported on any principle of justice.

This rule rests upon a “distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured

⁹⁶ *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544.

to give notice of and procure the required consent to a subsequent act, which by its conditions invalidated it, although previously consented to.”⁹⁷ The former kind of contemporaneous waivers may be shown, while the latter cannot.

For example, where it was provided in the policy that the instrument should be void if the building insured was located on leased ground, it was held that the insured could show by parol that the insurance company knew at the time it delivered the policy that the building was thus situated. “Such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose and as will estop him from setting up the condition against the insured.”⁹⁸ What, it may be asked, is “such a condition”? It is one wherein the risk would not have attached but for the waiver. There would never have been an instant of time when the loss would have given the insured the right to recover, unless he be permitted to show such a waiver.

Let us now consider contemporaneous waivers which cannot be shown. In a case previously cited,⁹⁹ the insurance company delivered a policy containing a clause which provided that the policy should become void if “the insured shall procure any other insurance on the property covered by this policy,

⁹⁷ Gray v. Germania Fire Ins. Co., 155 N. Y. 180, 49 N. E. 675, LEADING ILLUSTRATIVE CASES.

⁹⁸ Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434, LEADING ILLUSTRATIVE CASES.

⁹⁹ Gray v. Germania Fire Ins. Co., supra.

without the consent of the insurer endorsed hereon." At the time of the delivery of the policy, the insured told the company, through its agent, of his intention to take out other insurance, and the company, through its agent, replied that the policy was correct. Here it is clear that the policy "was valid in its inception."¹ It became invalid only in the future, when the other insurance was taken out in violation of the terms of the policy. Therefore, it was held that the parol evidence rule prevented the insured from showing such a parol waiver in an action on the policy. Hence, we may state the second part of this rule as follows: If the waiver at the time of the delivery of the policy relates solely to a state of facts to arise in the future and in no way tends to show that the policy was invalid when delivered, the evidence is inadmissible.

Two decisions of the United States Supreme Court. The decision of the United States Supreme Court on a question of this character does not bind the state courts. However, such a decision is, today, probably of much greater weight throughout the country than that of any other court of last resort, owing to the national character and personnel of the court. Two of its decisions in this connection have led to much discussion.

The Wilkinson case. In the first of these,² decided in 1871, an insurance agent had inserted in the application for life insurance, upon the life of Mrs. W., a representation that the mother of Mrs. W. had

¹ Gray v. Germania Fire Ins. Co., 155 N. Y. 180, 49 N. E. 675.

² Union Mutual Insurance Co. v. Wilkinson, 13 Wall. 222 (U. S.), LEADING ILLUSTRATIVE CASES.

died of fever, at the age of forty. The application was duly signed by Mrs. W. In an action to recover on the contract, the insurance company alleged that this representation was untrue. The plaintiff then proposed to show, by parol, that Mrs. W., an ex-slave, had told the agent of the insurer that she knew nothing about the time or cause of her mother's death. This evidence evidently contradicted part of the written contract. The court, however, held the evidence admissible and declared that the principle on which their decision was based was not that such oral testimony varies or contradicts that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying upon its contents; not that it may be contradicted by oral testimony but that it may be shown by such testimony, that it cannot be lawfully used against the party whose name is signed to it."

The Northern Assurance case. This very liberal rule in favor of persons insured, though adopted without a dissent, was shaken thirty years later by a decision from which three justices, including the chief justice, dissented.³ In this case, the policy upon which the action was based contained a clause making the policy void if other insurance upon the property should exist at the time of the issuance of the policy without the consent of the defendant insurance com-

³ Northern Assurance Co. v. Grand View Bldg. Assn., 183 U. S. 308, LEADING ILLUSTRATIVE CASES.

pany endorsed on the policy. The plaintiff proposed to show that the insurance company's agent knew of the existence of other insurance when the policy was delivered, though the endorsement did not appear on the policy. The Supreme Court, reversing the decision of the circuit court of appeals and of the circuit court, held the evidence inadmissible. The court did not overrule the Wilkinson case, in express language, but declared that parol evidence was properly admitted in that case to deny the execution of the statement upon which the insurer relied.

From what we have learned in this section we might have concluded that the evidence in the Northern Assurance case should have been admitted because the risk did not attach under the terms of the policy. However, the United States Supreme Court appears to have rejected this rule. That the question is not free from difficulty is evidenced by the holdings of the lower courts and opinions of the dissenting judges in the case.

It may be interesting to learn that the insured finally obtained his money from the Northern Assurance Company. The state court in Nebraska subsequently decreed a reformation of the policy and the United States Supreme Court refused to disturb the decree.⁴

31. Same subject—Waiver subsequent to the delivery of the policy.—We find, from our study of Blackstone, that there is no such a thing as an irrevocable law. "When you repeal the law itself, you

⁴ Northern Assur. Co. v. Grand View Bldg. Assn., 72 Nebr. 149, 102 N. W. 246, 203 U. S. 106.

at the same time repeal the prohibitory clause, which guards against such repeal.”⁵

This same principle applies to nearly all contracts. Though persons who marry cannot give up their relationship by mutual consent, probably no commercial contract can be drawn up in such a manner that the parties to the contract cannot agree to abandon or modify it, unless the rights of third parties be involved or the new contract be objectionable on grounds of public policy.

Accordingly, it is well settled that the parol evidence rule does not prevent the introduction of parol testimony to prove that after the delivery of the policy, a subsequent agreement modifying the agreement as evidenced by the policy, has been made. A provision in the policy that all future waivers must be in writing is like an irrepealable law. The insurer may waive this clause which guards against such a waiver.

Suppose that A, a generous man, donates breakfast to T, a tramp, at the door of A, at eight every morning for three months, or even for twenty-five years. Has T thus acquired a right to receive his breakfast thereafter, gratuitously, from A? Though, in England, the doctrine of “corodies”⁶ might assist T, it is clear, in this country, that T has acquired no legal right against A.

Let us compare this with what is, apparently, a similar case in insurance. The policy requires the insured to pay his premiums on February first, of

⁵ Cicero, as quoted in Blackstone's Comm. I, 90.

⁶ Blackstone's Comm. I, 283.

each year, without notice or demand from the company. For several years, the company voluntarily sends a notice to the insured when each premium falls due. Should such generosity bind the company to do this every time in the future when a premium falls due? It does, by the weight of authority.⁷ The reason for this rule is that the insurance company by its conduct has made an implied agreement to give the notice and that this agreement supersedes or waives the provision on this question in the policy.

32. Extent of the doctrine of waiver.—Certain rights of the insured and of the insurer cannot be waived. For example, the insurer cannot waive the right to defend on the ground that the insured had no insurable interest. By reason of public policy, insurance contracts in which the insured has no insurable interest in the property or life insured are illegal and void. To allow such a waiver would take us back to the days of “interest or no interest” policies.⁸

Rights given by statute. In many states, there are “valued policy” laws which require the insurer to pay the full amount of the policy in case of total loss, unless there has been depreciation in the value of the property. It has been held that the insured cannot waive his rights under the statute, on the theory that such a statute rests upon grounds of public policy.⁹

⁷ *Mayer v. Mutual Life Ins. Co.*, 38 Iowa 304, 18 Am. Rep. 34.

⁸ See chapter on “Insurable Interest.”

⁹ *Reilly v. Franklin Ins. Co.*, 43 Wis. 449.

Prescribed form of policy. In several states the exact form of an insurance policy is prescribed by statute. Such forms appear to be, not two-edged, but one-edged swords, and cut only in the direction of the insurance companies. Though the insured cannot, by a waiver of his part, lessen his rights against the insurer,¹⁰ the company may waive clauses designed to protect itself and thus increase the rights of the insured.¹¹

33. **Incontestable policies.**—To avoid the charge, made justly at times, and unjustly at other times, that the insurance companies always take advantage of every technicality to defeat recovery on the policy, several life insurance companies have adopted a form of policy containing what is known as an incontestable clause. This clause provides that the policy shall be incontestable either from date of issue, or, generally, after the lapse of one, two, or three years, except for the non-payment of premiums. Such a provision is annexed to all life insurance contracts by statute in certain states.

Such a comprehensive provision in regard to waiver does not prevent the insurer from showing, in defense, a lack of insurable interest. However, by the weight of authority, fraud perpetrated against the insurer in procuring the insurance cannot be shown.

Can the insurance company defend on the ground that the one whose life was insured is still alive? Clearly, it may. The incontestable clause, it seems,

¹⁰ Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871.

¹¹ Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80.

has nothing to do with the fact of death or matters arising thereafter, for example, failure to file proofs of death.

Can the insurance company set up suicide as a defense, if there is an incontestable clause? By the weight of authority it cannot, even though it might have done so but for the incontestable clause.¹²

¹² *Patterson v. Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, LEADING ILLUSTRATIVE CASES.

CHAPTER VI.

ASSIGNEES.

34. **Introduction.**—In this chapter, it is assumed that insurance, valid in every respect, has been issued. The attempt will then be made to ascertain to what extent and under what conditions the person, entitled to rights under the policy against the insurance company, can assign his rights to a third person, so that the latter may assert his rights against the insurance company.

35. **Property insurance.**—There are at least five situations which may arise in reference to the right of persons, whose property is insured, to assign their rights: (1) There may be an absolute transfer of the title and possession of property insured and the policy may be assigned to the purchaser by the former owner who was the party insured, without the insurer's consent. In marine insurance, such assignments are common and valid, though the policy makes no express provisions for assignment.¹³ In fire insurance, the rule is to the contrary. Unless the policy expressly allows for an assignment without the insurer's consent, it cannot be made. This is due to the fact that the contract is one in which the insurance company imposes much confidence in the insured and is regarded as strictly personal.¹⁴ It

¹³ *Earl v. Shaw*, 1 Johns. Cas. 313 (N. Y.); 1 Am. Dec. 117.

¹⁴ *Lyford v. Conn. Fire Ins. Co.*, 99 Me. 273, 58 Atl. 916.

happens every day that an insurance company is unwilling to insure a certain person, who might become an assignee of a policy if the rule were otherwise.

Since fire insurance does not pass with an assignment of the policy, a fortiori it does not pass if the property is sold and the policy is not assigned. It is well settled that fire insurance is not a right which "runs with the land," that is, it does not pass with a transfer of the land.¹⁵ Though it is customary to say that X's house is insured, this is not technically correct. In strictness, it is X who is insured against the loss of his house. (2) Let us assume that we have the same state of facts, but that the insurance company consents to the assignment. Here it is clear that the assignee is protected. However, he is not protected because he is an assignee, but because there has been a novation, a substitution of a new contract in the place of an old one which is thereby extinguished.

This distinction between an assignment and a novation is made clear in an Indiana case.¹⁶ The policy provided as follows: If the insured shall mortgage the property insured, without the consent of the insurer, this policy shall be void. However, the policy made no provision in reference to subsisting encumbrances. The property was mortgaged and then sold, subject to the mortgage, to M, who obtained the consent of the insurer to an assignment of the insurance policy. If this had been an ordinary

¹⁵ *Lynch v. Dalzell*, 4 Bro. P. C. (Toml. ed.), 431 (Eng.).

¹⁶ *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78, LEADING ILLUSTRATIVE CASES.

assignment, the assignee, as usual, would have stepped into the shoes of the assignor, and, since the policy had become void in the assignor's hands, the assignee could not have recovered. The court held that M could recover on the ground that upon "an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of indemnity arises between the insurance company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment."

(3) One may assign his right to receive the proceeds, if any, under an insurance policy without invalidating the policy. For example, A, a gentleman of means, about to take a long ocean voyage and desirous of avoiding the worry and care of business matters, might designate his confidential agent, X, as his agent, to receive any insurance money to which A, while on his journey, might become entitled by reason of the loss of A's homestead. Here A remains the one who is insured and he retains an insurable interest in the property. In such a case, the contract of insurance does not become void even though the policy provides that it shall be void if there is an attempted assignment without the insurance company's consent. Here the policy itself is not assigned, but only the right to receive the money in case of loss.¹⁷

(4) The fourth case is that of collateral assignment. There are two kinds of assignments: absolute and conditional. If the assignment is absolute,

¹⁷ *Whiting v. Burkhardt*, 178 Mass. 535, 52 L. R. A. 788.

the assignor retains no power whatsoever to recall the property or right assigned. If, on the other hand, the assignment is conditional, the assignor may reserve the right to take back the thing assigned upon the happening of a certain event. One of the most common forms of conditional assignments is the collateral assignment as security for a loan. For example, to secure a loan, the property may be mortgaged by X, the insured, to Y, to whom X may assign the policy conditionally and collaterally, that is, with the agreement that if within a year the money borrowed is repaid by X to Y, the mortgage and assignment of the policy shall be void. Such an assignment bears but little relation to an absolute assignment. Here X retains an insurable interest in the property. Accordingly, it has been held that such an assignment is valid and enforceable.¹⁸

Even though the policy forbids an assignment, this prevents only an absolute assignment and has no reference to a collateral assignment.¹⁹

This situation is not necessarily the same as in sub-section 3. Though the quasi-assignee here may acquire an insurable interest, in the case assumed in sub-section 3 he may be but a naked appointee without any insurable interest whatsoever.

(5) Let us assume that the policy expressly forbids an assignment either before or after the loss. Can the insurer forbid an assignment after the loss occurs?

An analogous situation is this: A philanthropist,

¹⁸ *Insurance Co. v. Phoenix Ins. Co.*, 71 Pa. St. 31.

¹⁹ *Griffey v. N. Y. Cent. Ins. Co.*, 100 N. Y. 417, 53 Am. Rep. 202.

A, gives a boy, B, a silver dollar on condition that he shall never spend it. Has B a right to spend it? Unquestionably he has. Such a condition is repugnant to the gift. Either A gave B the dollar or he did not. One of the wishes of A must be disregarded, either the gift or the condition. Clearly, it would be the condition.²⁰

It is on this principle that it has been held that "a condition in a policy of insurance that an assignment after loss, and especially after the liability of the insurer has become absolute by compliance on the part of the assured with all conditions subsequent, shall forfeit the contract and invalidate the policy, is void. For certainly, such a condition is entirely inconsistent with the contract of indemnity after the liability of the insurer has become absolute, and only the ordinary relation of debtor and creditor exists between the insurer and the assured."²¹

The conclusion which we are forced to reach is this: If the loss occurs and then the assignment, the assignee will be protected. But if an absolute assignment of fire insurance without the insurer's consent occurs and then the loss, there can be no recovery.²²

36. Life insurance.—Certain rules in regard to the assignment of the rights of the person entitled to the money due upon a life insurance policy are well established. (1) If the policy does not expressly prohibit it, an assignment is valid.²³ (2) The policy

²⁰ *Bradley v. Peixoto*, 3 Ves. Jr. 324 (Eng.).

²¹ *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91.

²² *North of England Oil-Cake Co. v. Ins. Co.*, L. R. 10 Q. B. 249 (Eng.).

²³ *N. Y. Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591.

may expressly declare that if an assignment is made, the policy shall be void, and such a provision will be enforced.²⁴ However, if the policy provides merely that notice of an assignment must be given to the insurer, and that, if no notice is given the assignment is void, such a provision is designed merely to protect the insurer and an assignment without notice will be protected in equity.²⁵

(3) Assuming that the policy does not forbid an assignment, two kinds of assignments may be made: conditional and absolute. It is well settled that a conditional assignment may be made, even to one having no other insurable interest in the life insured than that growing out of this particular transaction.²⁶ It is an everyday occurrence for a man to borrow money on his life insurance, that is, to deliver his insurance policy to the lender as collateral security for a loan. In such a case, it is clear that the lender has an insurable interest in the life of the debtor, because he is his creditor.

However, let us assume that the assignment is absolute and irrevocable. In such a case, the assignee may have an insurable interest in the life of the assignor. If he has, there is no objection to the assignment. He may recover to the same extent as if the insurance had been issued in his favor originally. But if the assignee has no insurable interest, an absolute assignment brings us into the midst of a conflict of authority. The United States Supreme Court has declared an assignment open to the same

²⁴ *Unity, etc., Assn. v. Dugan*, 118 Mass. 219.

²⁵ *N. Y. Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742.

²⁶ *Mut. Ben. Life Ins. Co. v. First National Bank*, 69 S. W. 1 (Ky.).

objection as the taking out of a policy originally in the assignee's name.²⁷ If so, the assignment is void in this case. There is much authority to the contrary, however, though all courts would, no doubt, agree that if a policy is taken out with the intention of assigning it, at once, to Y, who has no insurable interest in the life of X and could not have been the original beneficiary, such a transaction is void because it involves an attempt to evade the requirement of insurable interest. However, if the assignment is made in good faith, many courts uphold it, though it is absolute and though the assignee has no insurable interest in the life insured.²⁸

The practical importance of the problem is this: Most life insurance policies provide for a surrender value. For example, X, 35 years of age when insured for \$10,000, may be entitled, upon surrendering his policy at the end of seven years, to receive \$900 from the company. In many cases X will have a friend, Y, who will insist that the company is not offering him as much as it should. Furthermore, X may be dying of consumption and in serious need of ready cash. Why not permit X to sell the policy to Y absolutely, for \$1,000? To forbid this is to give the insurance company a monopoly of purchase.

²⁷ Warnock v. Davis, 104 U. S. 775, LEADING ILLUSTRATIVE CASES.

²⁸ Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, LEADING ILLUSTRATIVE CASES.

CHAPTER VII.

BENEFICIARIES.

37. Introduction.—It is not customary to speak of the equitable interest in property unless the legal title and equitable interest are in different persons. It is equally true that, in insurance, we do not generally speak of a beneficiary unless the insured and the beneficiary are different persons. The insurer is the party who agrees in consideration of a small sum called the premium to pay a much larger sum when the event insured against occurs. The one who procures the insurance and pays the premium is called the insured. The one to whom the insurance money is to be paid is called the beneficiary. At least in life insurance, we may have a fourth party. For example, Mrs. A insures the life of her husband, A, senior, in favor of the son, A, junior. Here Mrs. A is the insured and A, junior, is the beneficiary. What shall we call A, senior? In view of the fact that usage has not sanctioned a better term for him, we may designate A, senior, as the life insured, or, simply, the life.

38. Property insurance—Owners of limited interests.—Two questions of importance have arisen in regard to the rights of beneficiaries in property insurance: (1) in the case of owners of limited interests, and (2) in the case of mortgagors and mortgagees.

Much confusion has arisen in cases involving insurance by lessees, life tenants, bailees and other owners of limited interests. Take the case of the life tenant. Two questions are presented: (1) How much can he recover? (2) If he recovers more than the estimated value of his interest, must he hold the excess in trust for the remainderman? The decisions are in conflict on both questions. (1) It has been held that the life tenant can recover only the value of his life estate.²⁹ On the other hand, there are authorities which hold that he may recover to the full extent of the value of the property destroyed,³⁰ and this is the rule by the weight of authority. (2) If we allow the life tenant the full value, shall he be permitted to put all the money in his pocket? If so, would we not give too great an incentive to arson? The Massachusetts court does not think so, but allows him to pocket all the money and allow the remainderman no benefit therefrom.³¹ However, there are contrary decisions which require the life tenant to hold the excess, over the value of his interest, in trust for the remainderman, unless the money is used to rebuild.³² If the life tenant rebuilds, he will, of course, hold the new building only for life and it will then go to the remainderman. Such a rule is eminently just, particularly when the life tenant has agreed with the remainderman to keep the property insured.³³

²⁹ *Beekman v. Ins. Assn.*, 73 N. Y. Supp. 110, 66 App. Div. 72.

³⁰ *Merrett v. Farmers' Ins. Co.*, 42 Iowa 11.

³¹ *Harrison v. Pepper*, 166 Mass. 288, 44 N. E. 222, LEADING ILLUSTRATIVE CASES.

³² *Sampson v. Grogan*, 21 R. I. 174, 44 L. R. A. 711.

³³ *Convis v. Citizens' Mutual Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994.

39. Same subject—Mortgagors and mortgagees.

—Four situations have arisen involving the rights of mortgagors and mortgagees. (1) The mortgagor may insure his interest in the property without regard to the mortgage and without any contract with the mortgagee to effect insurance. In this case, if the property mortgaged is destroyed, the lien of the mortgage does not attach to the insurance money, though the rule is, no doubt, otherwise if the mortgagor is under contract with the mortgagee to insure.³⁴ (2) The mortgagee may do likewise. He may insure his interest without regard to the mortgagor and without any contract requiring him to insure. In the chapter on Insurable Interest we found that a mortgagee has an insurable interest and, in the chapter on Subrogation, that, by the great weight of authority, the insurer on indemnifying the mortgagee, in this case, succeeds to the latter's rights under the mortgage.

(3) We shall now consider the most common form of insurance of mortgaged property. Generally, the mortgagor agrees in the contract of mortgage to keep the premises insured in the sum of not less than a certain stated amount, which generally equals or exceeds the amount of the loan. The policy is made payable to the mortgagee "as his interest may appear," and the balance, if any, to the mortgagor. The interest which the mortgagee may appear to have is, of course, equal to the amount due on the loan at the time of the fire. When the mortgagor is making weekly or monthly payments to the mort-

³⁴ *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U. S. 434.

gagee, the interest of the latter is changing constantly and may disappear entirely before the fire. Hence, instead of attempting to state exactly in figures the amount of the mortgagee's interest, the "as his interest may appear" clause is used. In this case, and, in fact, in any case in which the mortgagor agrees to keep the interest of the mortgagee insured, the insurance money is subject to the claim of the mortgagee³⁵ and no right of subrogation is given to the insurer unless it is expressly agreed that the right shall exist.³⁶ The mortgage debt becomes paid to the extent that the mortgagee receives insurance money. (4) The fourth case is that in which the mortgagee takes out insurance for the benefit of himself and the mortgagor. Frequently, it is provided in the mortgage that, if the mortgagor does not insure, the mortgagee may procure the insurance and add the charges to the mortgage debt. The mortgagee should, and probably must, take out this kind of insurance in such a case. The result here is the same as in sub-section 3 next preceding. Payment to the mortgagee discharges the mortgage debt pro tanto; no subrogation is allowed, except by agreement.

Acts of the mortgagor. If the insurer can show that the owner of property intentionally set fire to his house or violated a term of the policy it is clear that the owner cannot recover his insurance. But will this prevent the mortgagee, insured by the same policy, from recovering? If the mortgagee is but a beneficiary under a contract made between the

³⁵ *Wheeler v. Ins. Co.*, 101 U. S. 439.

³⁶ *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711.

insurer and the insured, the mortgagee would, no doubt, be denied recovery.

This situation is generally provided for, however, by an express provision in the policy, either protecting the insurer by making all conditions in the policy applicable to both the mortgagee and mortgagor, or protecting the mortgagee by providing that the interest of the mortgagee shall not be invalidated by any act of the mortgagor, except the non-payment of the insurance premium.³⁷

40. **Life insurance.**—If A procures an ordinary life insurance policy in favor of his wife, B, and does not reserve the right to change the beneficiary, what is the nature of B's rights? Disregard the fact that A and B are married, as we may today in most states. (1) It has been suggested that B is in the same position as if A had made a will bequeathing her a sum of money. However, this is not true for the reason that B acquires rights before A dies. A cannot defeat B's rights at any time by substituting someone else in her place. Had A made a will, he could, generally, revoke it at any time and B would acquire no rights thereunder until A dies. (2) It would prove unfruitful to compare B to an assignee and A to the assignor of a chose in action. Such an assignee must sue in the assignor's name, while B sues, at law, in her own name. Furthermore, the right did not move from A to B, but from the insurer to B. In many of these cases, there has never been an instant when any right against the insurer resided in A. (3) The term "beneficiary" may lead us to assume that B's

³⁷ *Smith v. Union Ins. Co.*, 25 R. I. 260, 55 Atl. 715.

position is that of a cestui que trust or beneficiary of a trust. This is not true because a cestui que trust cannot, as a rule, institute an action at law against the obligor. B has no difficulty in most jurisdictions in bringing an action at law against the insurer.

(4) It has been suggested that A, in taking out this insurance, acted as agent of B. This is contrary to fact. When a man buys a box of candy for his wife he is not acting as her agent, necessarily. This is equally true when he buys insurance. He may be, but is not always, her agent in such cases. (5) Another suggestion is this, that when A delivers the policy to B, it becomes an executed gift, as in the case when he hands over the box of candy. Now it is axiomatic that after giving the candy to B, he cannot take it back at will, and we have found in subsection 1 that the same rule applies to B's rights. The bottom falls out of this theory, however, when we learn that an insurance policy need not exist to give B her rights; that the contract need not be reduced to writing, and that B's rights vest as soon as the contract is complete, even though she may never hear of the contract nor see the policy.³⁸ (6) We may feel that B is in the position of one for whose benefit a contract has been made and may be allowed to sue the promisor under the rule in *Lawrence v. Fox*.³⁹ This case is familiar to all students of the law of contracts. It allows X to sue Y for the breach of a promise made for the benefit of X in a contract

³⁸ *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294, LEADING ILLUSTRATIVE CASES.

³⁹ *Lawrence v. Fox*, 20 N. Y. 268.

between Y and Z. At least one good reason makes this comparison odious. Though under the rule in *Lawrence v. Fox* it is generally recognized that, at least, before X assents to or acts upon Y's promise, Z may release Y from liability to X without the consent of X, A cannot release the insurance company from liability to B without B's consent, even though B did not hear of the insurance. (7) The rights of the beneficiary of life insurance are frequently said to be vested. This statement must be made with a word of caution. In the vague, popular, and political sense in which the word "vested" is used, we may say that B has a vested right; that is, a right of property which the law will protect. But in the sense in which the word "vested" is applied to estates in remainder in real property, the interest of B can hardly be considered vested. It is subject to many contingencies, particularly the non-payment of premiums. Though the right of B exists, A is not compelled to pay future premiums. Furthermore, A, by going to the Philippines, may violate a term in the policy and thus render it void.

In conclusion, it may be said that the rights of a beneficiary in life insurance are anomalous and peculiar and cannot be disposed of on general principles applicable to any other single relationship. However, there are points of resemblance between other legal positions and that of the beneficiary.

41. Same subject—Beneficiary designated unconditionally.—The following discussion may enable us to determine more definitely the exact nature of the interest of a beneficiary unconditionally designated.

Murder of insured by beneficiary. If A gives B a box of candy and then is murdered by B, it is clear that the title to the candy does not then revert to A's estate. On the other hand, it is equally well settled, by the weight of authority, that if A, by will, leaves property to B and is then murdered by B, B will not be permitted to take a beneficial interest in the property devised or bequeathed.

Which of these cases does life insurance resemble? Assume that A insures his life in favor of B, who murders him ten years thereafter. Shall we say that B's interest became absolute when the contract is made, or, as in the case of the will, upon A's death? In this respect, life insurance policies resemble wills. B cannot recover the insurance.⁴⁰ This rule applies though the beneficiary has not been designated unconditionally and the power to change the beneficiary is reserved. However, the strongest case in the beneficiary's favor is that wherein he is unconditionally designated. Nevertheless, he fails in this case also.

Transfer of interest. The beneficiary, unconditionally designated, may transfer his or her interest without the consent of the insured unless, by statute, such consent is required, as, for example, where the beneficiary is the wife of the insured and the consent of the latter, as husband, is made necessary. The beneficiary's right may be regarded as a chose in action for this purpose.⁴¹

Death of beneficiary. To return to our box of

⁴⁰ N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591.

⁴¹ Hewlett v. Home for Incurables, 74 Md. 350, 17 L. R. A. 447.

candy, if A gives it to B and then B dies, it goes to B's personal representative and does not revert to A. The same rule applies, by the weight of authority, where A procures insurance on his life for B. However, owing to the seeming injustice of letting such an investment go to the wife's relatives when A has sunk his money into it and may not have been on good terms with the persons who would otherwise reap the benefit, many courts have held that the right in B terminates with her death, on the ground that this was the intention of the parties, and such is the rule by statute in certain states.

42. Same subject—Rights of beneficiary subject to a condition.—It is extremely common for a man to procure life insurance payable to B, the wife of the insured, if living, or otherwise to C and D, their children. Here it may be observed that the insured reserves no right to change the beneficiaries, though the rights of C and D are contingent.

After making this wise provision for his family it is, regrettably, too common that the husband and wife find themselves in financial embarrassment a few years thereafter and decide to secure the surrender value of the policy. But where the insurer allows a surrender he must generally obtain a release from a beneficiary unconditionally designated. It would seem, therefore, that unless C and D join in the release and are legally capable of doing so, their rights will not be defeated by a release given by the husband and wife. The insurer would take such a release at his peril. If B outlived the husband, the insurer would be protected, but not otherwise. The

difficulty in this case is further increased when the insurance is payable, if the wife be not living, to the children generally. This would include those born and unborn at the time the policy is issued.

43. **Same subject—Right to change the beneficiary reserved.**—In many cases, the policy designates someone as beneficiary, with right of revocation reserved to the insured. It might be held that B here takes a property right which differs from that of a beneficiary unconditionally designated in but one respect, namely, that the right may be revoked, and that until revocation B has a property right. But the rule appears to be the other way. B's right is regarded not as a property interest, but as a mere possibility.

This is the rule which is generally applied to all beneficiaries in mutual benefit associations. Such associations are organized, in theory, not for purely commercial reasons, but for the mutual benefit of their members. Their purposes are social and benevolent. Hence, we find that the payment of a so-called death benefit is looked upon not as a matter of strict legal necessity, but as evidence of fraternal affection. Nevertheless, there are limits to such affection on the part of members. Though a daughter designated as beneficiary pays all dues and assessments for several years for the sake of retaining her mother's membership in a mutual benefit association, the mother may, notwithstanding, deprive her daughter of all interest and designate another person as beneficiary and thus leave the daughter without remedy unless there has been a contract made

between the daughter and mother binding the mother not to change the beneficiary.⁴² This may appear harsh, but the time may never come when persons, who donate their property in the hope of having the donees give more in return than such donees receive, will be entitled to relief at law.

In many instances, the association requires a member to comply with certain formalities before making a change of beneficiaries. Thus, the member may be required to produce and surrender the certificate. Such rules may be enforced by the association.

In many cases of this character the first beneficiary refuses to surrender the certificate. But if the association does not object to a failure to comply with such requirements, the prior beneficiary cannot protect himself by setting up such regulations in his own behalf. Such provisions are designed for the protection only of the association. In many cases, the association pays the money into court and allows the controversy to proceed between the rival beneficiaries. Not only are such provisions of no protection to the prior beneficiary, but it has been held that where the member does all that he can do to make a change, the association will be denied any defense on this ground, if no other steps than mere office details of the association remain to be completed when the member dies.⁴³

But suppose that the change from B as beneficiary to C as beneficiary has been induced by fraud, or that the member was insane when he made the alteration.

⁴² *Jory v. Supreme Council A. L. H.*, 105 Cal. 20, 26 L. R. A. 733, 38 Pac. 524, LEADING ILLUSTRATIVE CASES.

⁴³ *McGowan v. Order of Foresters*, 104 Wis. 173, 80 N. W. 603.

Let us assume, furthermore, that if no one else is designated, the money will go to the personal representative of the member. Has B sufficient interest here to allow him to object to the fraud or set up the insanity? Or, is the personal representative the only one who can raise the question? It has been held that B has sufficient interest for this purpose.⁴⁴

44. **Same subject—Surrender value.**—Where a beneficiary has been unconditionally designated and all the premiums have been paid by the insured, who is entitled to the money paid by the insurer upon the surrender of the policy? The answer to this question is that the rule appears to be that unless the contract makes provision for surrender value, or unless a statute creates it, the right to any payment on surrender does not exist. The rights of the insured and beneficiary would cease on failure to pay a premium after it falls due; or, at least, no return of cash could be demanded.

Therefore, since surrender value is purely a matter of contract, it is governed entirely by agreement. But it is possible that the policy may provide for surrender value without specifying to whom the money is to be paid. In such a case the party entitled to receive the money paid by the insurer must be determined solely by the agreement among the parties at the time of the surrender. When the beneficiary is unconditionally designated he may demand at least a share of the money, because his consent is generally necessary to make the surrender effective.⁴⁵

⁴⁴ Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232, 94 N. W. 731, LEADING ILLUSTRATIVE CASES.

⁴⁵ D'Arcy v. Conn. Mut. Life Ins. Co., 108 Tenn. 567, 69 S. W. 768.

CHAPTER VIII.

CREDITORS.

45. **Introduction.**—In the chapter on insurable interest, the interest of a creditor in the life or property of his debtor was ascertained. However, we have not considered the rights of creditors to levy execution on rights under insurance policies, nor the ability of the creditor to obtain all of the amount of a policy which he has procured on the life of his debtor.

46. **Property insurance.**—Creditors of one who has insured his property may attempt to seize the rights of the latter under the policy either before or after the property is destroyed.

(1) *Before loss.* Assume that a debtor owns a building in one state but keeps his fire insurance policy in another state in which he and his creditor reside, and also the insurer, and that the policy insures the building for five years. It is customary, in fire insurance policies, to provide for a repayment of any unearned portion of the premium upon a cancellation of the policy and for a right of cancellation by either the insurer or the insured upon five days' notice. Can the creditor, in such a case, force a cancellation and payment over to him of this unearned portion of the premium? There appears to be no reported case in which this question has been decided. We might complicate matters by assuming that the

building is the homestead of the insured and is exempt from the claims of creditors. This proposition may never be determined owing to the small amount which is generally involved.

(2) *After loss.* After the loss occurs, the right to the insurance money is regarded as vesting in the debtor. Being a chose in action in which the insurer is the obligor, the creditor may institute the usual proceedings in such cases for attaching it. But there is difficulty here, if the property destroyed is exempt from seizure by creditors. Though there is a conflict of authority, the generally accepted rule is that if the property destroyed is exempt, the insurance is also free from seizure.

However, the following qualifications have been annexed by certain courts to the rule that such insurance money is exempt: (a) The owner must intend to reinvest in similar property.⁴⁶ (b) The debtor has a reasonable time within which to use the insurance money to replace the exempt property if he has not used other means for this purpose.⁴⁷

47. **Life insurance.**—The rights of creditors in the insurance on the life of the debtor vary in the three following classes of cases: (1) Where the insurance is made payable to the estate of insured; (2) where the insurance is made payable to one other than the debtor or creditor; (3) where the insurance is made payable to the creditor.

48. **Same subject—Debtor as the beneficiary.**—Where insurance on the life of X is made payable

⁴⁶ Puget Sound, etc., Packing Co. v. Jeffs, 11 Wash. 466; 27 L. R. A. 808.

⁴⁷ Cooney v. Cooney, 65 Barb. 524 (N. Y.). The rights of mortgagees as creditors were discussed in the previous chapter on Beneficiaries.

to the debtor, D, and has been procured by a third party, T, the creditor, C, of the debtor-beneficiary may be unwilling to await the death of X in order that he may satisfy his claim out of D's rights to the insurance.

If the insured has reserved the right to change the beneficiary, it is clear that C can secure nothing before the maturity of the policy.

If D is unconditionally designated and the policy has not matured, C could get nothing from the insurer if there is no surrender value. But if the policy has a surrender value, and the insurer is bound to pay the money on surrender to D, the creditors could, no doubt, obtain this amount, unless a statute prevents it, as, for instance, in proceedings in bankruptcy.

However, D may be the insured, and also the one to whose estate the insurance is to be paid on the death of X. There is probably no difference between this case and one in which D insures his own life under the same circumstances. If the policy has matured and the rights of D have thus vested, the creditors will have no difficulty in securing the money. But if the policy has not vested, there are at least two possibilities which may arise: the policy may have a surrender value, or it may not.

The following rule, established in the present National Bankruptcy Act, is just and in accord with the probable rule in the absence of statute. This act requires that insurance shall pass as assets to the trustee for the benefit of creditors if it has a cash surrender value payable to the bankrupt, his estate,

or personal representatives.⁴⁸ If it has no surrender value the creditors derive no benefit from it, since it is not regarded as part of the bankrupt's assets.⁴⁹

The bankrupt law, in addition to the foregoing requirement, makes a salutary provision for the redemption of the bankrupt's life insurance by paying the amount of the surrender value to the trustee within a limited time after bankruptcy.

49. Same subject—Debtor as the insured.—A knowledge of the law of trusts is necessary to solve the problem which arises when a man steals money and buys with it life insurance payable either to himself or to a third party. To express an opinion as to what is the sound rule on the question would be merely a statement of what one thinks the law of trusts ought to be in this class of cases. Where the thief uses the stolen money to pay premiums on insurance already issued, there is some confusion, not peculiar to insurance law, and capable of solution by the application of the principles found in the law of trusts and property. Investment in life insurance is but one form of investment, which may yield immense profits to the investor.⁵⁰

The following question in regard to a debtor as the insured has caused much conflict of opinion: Can a man who knows he is insolvent procure insurance in favor of those who are dependent upon him for support? Two or three principles should first be stated before attempting a solution of this ques-

⁴⁸ National Bankruptcy Act of 1898, § 70 (5).

⁴⁹ *Morris v. Dodd*, 110 Ga. 606, 50 L. R. A. 33.

⁵⁰ *Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566, 34 N. E. 205,

tion. (1) Though the principles which have grown up around the rule forbidding fraudulent conveyances are very rigid in regard to gifts of one's property when one knows he is insolvent, such rules, in the interest of humanity and justice, would probably never be carried to the extent of making it either criminal or fraudulent for any purpose for an insolvent debtor to make very modest presents, at least at certain seasons of the year, to his wife or children. (2) The luxuries of yesterday become the necessities of today. Though silk hose may have been the mark of aristocracy two hundred years ago they have lost their probative force. And so it has been with life insurance. At first though it may have been a luxury indulged in by the few, today it may be regarded as in every sense of the word a household necessity. The force of this statement is perceived when the slight annual cost of many forms of life insurance is considered.

Hence, we should not be surprised to find that the United States Supreme Court has decided that a married man, though insolvent, may rightfully devote a moderate portion of his earnings to the insurance of his life, and thus make reasonable provision for his family after his decease, without being guilty of defrauding his creditors, provided no such fraudulent intent is shown to exist in fact or can be inferred from the surrounding circumstances.⁵¹ In other words, the fact that he is insolvent in such a case is not conclusive evidence of fraud. Actual fraud must be shown to enable the creditor to have the

⁵¹ *Washington Bank v. Hume*, 128 U. S. 195

transfer set aside as fraudulent. Though this decision has been criticized⁵² on the ground that it is a piece of judicial legislation, it has been followed in several states.

If the debtor is not insolvent when he effects the insurance, but later becomes insolvent, the position of the creditor is not so strong, and must be determined in the light of the general rules which have been established in connection with the statute of 1833 Elizabeth in regard to fraudulent conveyances.

50. Same subject—Creditor as the insured.—When the creditor procures insurance on the life of the debtor, shall the creditor be permitted to keep all of the insurance, even though the debt has been paid in full?

If we adopt the theory that life insurance is a matter of investment as well as a matter of indemnity, there appears to be no objection to allowing the creditor to retain all the proceeds from the insurance. This rule has been adopted by many courts.⁵³ Other courts have reached a contrary opinion⁵⁴ and allow only indemnity, particularly where the debtor has taken out insurance in favor of his creditor as beneficiary.⁵⁵ In such cases they allow the creditor only indemnity and give the surplus, if any, to the debtor's estate. But cases in which the debtor is the insured may be distinguished readily from those in which the creditor himself takes out the insurance and

⁵² 25 American Law Review, 185.

⁵³ *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518, LEADING ILLUSTRATIVE CASES.

⁵⁴ *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564.

⁵⁵ *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621.

bears the expense. In this case, to allow the debtor's estate to have the surplus is to give property to persons who would have difficulty in proving their moral right to it. It would be equally just to allow the insurer to retain it.

51. Same subject—Statutory exemption.—Very sweeping statutory provisions exist, in many states, either for the exemption of all beneficiaries of life insurance, or, at least, the wife and children of the insured. These statutes might suggest to an unscrupulous and insolvent person the desirability of investing all his belongings in a very short-term endowment policy in favor of his wife. Thus, in a few years, by the grace of his wife, he would be enabled to enjoy his belongings free from the pressure of his creditors. However, a Nebraska court has declared endowment insurance to be a loan rather than a case of insurance and regards the insurance in such a contract as a mere incident and insufficient to exempt the rights of the beneficiary from the claims of the husband's creditors.⁵⁶

In another case, the proceeds of life insurance were exempted, by statute, from the debts of the decedent. In the insured's last illness, X nursed him. Later, Y buried him. It was held that Y's but not X's claim should be satisfied out of the insurance money. Y's claim for funeral expenses had never been a debt against the insured, but only against his estate.⁵⁷

⁵⁶ Tolcott v. Field, 34 Neb. 611, 52 N. W. 400.

⁵⁷ Dobbs v. Chandler, 84 Miss. 372, 36 South. 388.

THE SEVERAL FORMS OF INSURANCE

CHAPTER IX.

FIRE INSURANCE.

52. **The fire insurance business.**—Approximately nine-tenths of all the fire insurance business in the United States is in the hands of ordinary corporations or stock companies. Their combined assets amount to more than a half billion dollars.

Two other forms of organization are known. There are over a thousand organizations doing business on the mutual basis; that is, without the intervention of stockholders and without any other liability upon which to rely except that of the organization's members, all of whom are insured in the "mutual." This form has been particularly successful in the case of the "factory mutuals," organized for the mutual protection of factory owners, and very active in fire protection. This form is also much used by farmers.

The last form to be noticed is the "Lloyd's Association," a kind of partnership concern, named and modeled after the successful British organization.

53. **Form of policy.**—In most states the form in which a fire insurance policy shall be drawn is left

to the agreement of the parties, subject only to minor regulations by statute. However, in about one-third of the states⁵⁸ the legislature has prescribed a certain form, known as a standard form of policy, to which all fire insurance policies issued within the state must conform. These forms vary considerably. At the same time there are clauses and expressions which are about the same in most of them. The more important of these, as construed by the courts, will be considered in this chapter.

54. Effect of breach.—It is customary to provide that the entire policy shall be void if, for example, the insured is not the sole owner of the property insured, or if he allows benzine on the premises. Since the word “entire” is used it has been held that where a man insured, under the same policy, beds and furniture which he did own, and a piano which he did not own, he could not recover anything because he was not the sole owner of the property insured.⁵⁹

If the term “void” is construed strictly in the insurer’s favor, a man cannot recover his insurance if he has allowed benzine on the premises for a few minutes several years before the fire occurred, but not afterwards. Accordingly, many, though not all, courts have held that a temporary breach, as in the case assumed, merely suspends the insurance while the benzine is on the premises.

55. Location.—The policy generally insures the

⁵⁸ Connecticut, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, West Virginia and Wisconsin.

⁵⁹ *McWilliams v. Cascade Fire & M. Ins. Co.*, 7 Wash. 48, 34 Pac. 140.

property only while it is located and contained as described in the policy and not elsewhere. If this clause is to be construed literally and strictly, one could not recover his insurance on his clothes when described as located within a house, if they burned while drying on the clothes line in the back yard. There is a decision to this effect.⁶⁰ Courts, however, have been more liberal, particularly when the words "and not elsewhere" are omitted, and hold, where the use of the goods is not customary without temporary removal, that such removal does not relieve the company from liability, even if the goods are destroyed in their temporary resting place.⁶¹

56. Ownership and change of ownership.—It is generally requisite that the interest of the insured be that of "sole and unconditional ownership," and if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, or if, with knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale, by virtue of any mortgage or trust deed, the policy shall be or become void.

The courts have been very liberal in regard to ownership on the part of the insured. A mere leasehold on the land on which the building insured is situated is insufficient because of an express provision in most policies. But if the layman, as distinguished from the professional lawyer, would regard the insured as the owner of the property and the loss by fire would fall on him, the courts are inclined

⁶⁰ *Leventhal v. Home Ins. Co.*, 66 N. Y. Supp. 502, 32 Misc. 685.

⁶¹ *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 9 S. E. 694.

to allow the insured to recover his insurance even though there is a cloud on the title.

As to mortgages, it must be noted that these need not be disclosed unless the property is personalty. A curious construction to the foreclosure provision has been given by certain courts. This policy reads, "if, with the knowledge of the insured, foreclosure proceedings be commenced." They have held that to invalidate the policy, the knowledge must precede the commencement of proceedings, and if the knowledge does not exist until after the commencement, this clause does not affect the validity of the policy.⁶²

57. Other insurance.—It is now generally provided that the policy shall be void, "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy without agreement indorsed hereon or added hereto." The objection to other insurance is based on the danger of over-insurance. Over-insurance is a very strong incentive to arson.

The expression, "whether valid or not," was not inserted until after many courts had held that the first policy was not avoided if the second was invalid; for example, because the latter contained a clause making the second itself void if there was any other insurance on the property when the second was issued. Other courts had held that the first became void as soon as the second was issued, and therefore recovery was allowed on the second.

⁶² North British & Mercantile Ins. Co. v. Freeman, 33 S. W. (Tex. Civ. App.) 1091.

It is obvious that the other insurance, to be of consequence in this connection, must cover the same character of loss. Fire insurance would not be invalidated by tornado insurance not embracing fire losses.⁶³

Another phrase which was hit upon only after much litigation is, "in whole or in part." Before this provision was inserted it had been held that there was no other insurance within the meaning of this clause unless it covered identically the same property.

Suppose that the owner of an undivided half interest in a house insures his interest and then the other half owner insures his half, have we a violation of this clause? It is held that this is no violation, since separate interests are insured. This is equally true where mortgagor and mortgagee insure their interests separately.⁶⁴

58. **Co-insurance.**—Co-insurance exists when more than one valid policy covers the same loss. For example, A insures his \$3,000 house with B for \$1,000 and with C for \$1,500. In such a case, in the absence of any stipulation to the contrary, A may recover the full amount of a loss of less than \$1,000 from either B or C, and let them look to each other for contribution. However, it is frequently provided in the policy that A can hold each liable only for his pro rata share.

Regardless of the rule in marine insurance, it is well settled that where A insures his \$3,000 house

⁶³ *Australian Agr. Co. v. Saunders*, L. R. (1875) 10 C. P. 668 (Eng.).

⁶⁴ *Home Ins. Co. v. Koob*, 24 Ky. Law Rep. 223, 58 L. R. A. 58.

with but one insurer, D, for \$2,000, and the house is damaged to the extent of \$1,000, A may recover the full \$1,000 from D.⁶⁵ At times there are inserted co-insurance clauses which require A, in such a case, to insure the property for as much as, for example, eighty per cent. If he fails to do this before the fire and a \$1,000 loss occurs, D would be liable only for the amount for which he would have been ultimately liable in contribution if A had insured with another, E, up to the amount of eighty per cent.

59. Various forbidden increases of risk.—It is generally provided that the policy shall become void if the hazard be increased by any means within the control or knowledge of the insured. Whether or not there has been an increase of risk is a question of fact in each case, and is generally a matter for the jury to decide, under all the circumstances of the case. The courts have held, very properly, that to constitute an increase which will avoid the policy, it must be substantial and not of a highly temporary character.

It will be observed that the risk must be within the insured's knowledge or control. If literally construed, the storage of gunpowder or dynamite a half a mile from the premises insured, to the knowledge of the insured, might avoid the risk. To prevent such a result, one court has, rather arbitrarily, declared that the increase must occur upon property under the control of the insured; that is, upon the very premises of the insured.⁶⁶

⁶⁵ *Wiggin v. Suffolk Insurance Co.*, 18 Pick. 145 (Mass.), 29 Am. Dec. 576.

⁶⁶ *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333.

The fact that the insured conducts himself negligently, even for a few minutes, may increase the risk and cause a fire. However, it is generally held that the negligence of the insured is one of the very things insured against. For example, where he used kerosene, on only one occasion, in his efforts to kindle a fire, recovery was allowed.⁶⁷ But where the negligent use of kerosene becomes a habit and displays itself in the keeping of a jug containing crude petroleum in a room full of merchandise, it must be left to the jury to determine whether the risk has been materially increased.⁶⁸

Making repairs. In several, though not all, of the standard policies, express provision is made for the avoidance of the policy "if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time." It is generally held that unless an express provision of this character is inserted in the policy, the making of repairs is not necessarily an increase of risk. Though in one case the court seized upon the word "mechanics," and held that common painters are not mechanics,⁶⁹ in another case it was held that polishing woodwork and reburnishing fixtures, if continued for more than fifteen days, avoided the policy.⁷⁰ This clause is designed to require the insured to get the permission of the insurer before commencing repairs of a very extensive character.

⁶⁷ Angier v. Western Assur. Co., 10 S. D. 82, 71 N. W. 761.

⁶⁸ Williams v. People's Fire Ins. Co., 57 N. Y. 274.

⁶⁹ Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368.

⁷⁰ German Ins. Co. v. Hearne, 117 Fed. 289, 59 L. R. A. 492.

Dangerous substances. It is provided, in the New York standard form, that the policy shall be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or any other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States Standard (which last must be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

The phrase, "any usage or custom to the contrary notwithstanding," was inserted to avoid the ruling of the courts that if, for example, a printing office was insured, and if it was customary to use camphene in the business, a prohibition against camphene is of no consequence.⁷¹ It was held, in one case on this principle, that the insurance of a retail hardware store allowed the owner to keep dynamite on the premises.⁷² The insurance companies thought they would settle matters, once and for all, by inserting this clause that usage to the contrary is of no consequence. However, this provision has, apparently, not altered the situation a particle.

Two closely related reasons for the position of the courts on this matter have been suggested. (1) Writ-

⁷¹ Harper v. N. Y. City Ins. Co., 22 N. Y. 441.

⁷² Phenix Ins. Co. v. Walters, 24 Ind. App. 87, 56 N. E. 257.

ing controls printing. The clause in regard to benzine, benzole, and the rest is printed. The description of the property is generally written into the policy either with a pen or a typewriter. (2) There is a repugnancy in insuring a printing office and forbidding camphene. As has been forcibly suggested, don't insure a match factory and expect it to be run as waterworks. Either a printing office, including its camphene, has been insured or it has not. We should construe the policy most strongly against the insurer, the party who draws it up. Another principle in this connection may for good reason remind us of the laxity of Rip Van Winkle, though the justice of the rule is evident. Though the policy forbids ether, a little does not count. For example, a small quantity of any of the forbidden substances, if used for medicinal purposes, does not avoid the policy. The word "used" has been turned to the advantage of the insured and has been held to be a provision against danger arising merely from "habitual, constant, or continued exposure" of the property through the presence or use of the articles enumerated.⁷³ In like manner, "keep or have" has been held to refer only to permanent and habitual storage of articles, and not to a mere temporary use.⁷⁴

60. Vacancy of premises.—There is considerable variety in the vacancy clauses of the various policies. The New York form provides that the policy shall be void, "if a building herein described, whether intended for occupancy by owner or tenant, be or

⁷³ Springfield F. & M. Ins. Co. v. Wade, 95 Tex. 598, 58 L. R. A. 714.

⁷⁴ Bentley v. Lumbermen's Ins. Co., 191 Pa. St. 276, 43 Atl. 209.

become vacant or unoccupied and so remain for ten days.”

The general purpose back of this clause is to prevent an increase of risk which insurance companies, apparently, believe exists when the buildings are deserted and, consequently, are likely to receive no personal care and may become the nesting places of tramps. Let us consider the more important phrases in this clause, in the order in which they appear.

“Whether intended for occupancy by the owner or tenant” was inserted because the courts held that what would be vacancy if one insured his own private residence would not necessarily amount to vacancy if the property was described as a building generally designed for rental purposes. It was said that if one insures his building as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises and that more or less time might elapse before the owner could procure another tenant to occupy them.⁷⁵ To prevent this construction the phrase in question was inserted. However, from what we learned in the previous section about the way in which the phrase, “any usage to the contrary notwithstanding,” was construed, we might be led to expect that the courts would hold that if the building is described as a tenement house, there is repugnancy here and that the description controls. This rule of interpretation is apparently not accepted as yet.

⁷⁵ *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 44 N. W. 1106.

“Be or become” needs but little explanation. It is curious that the Massachusetts standard policy here uses but one word and that is, “become.” Thus, the way is open for one to contend in Massachusetts that if the premises be vacant when insured and up to the time when the fire occurs that the policy is not void. This contention would probably be successful in some jurisdictions,⁷⁶ though it would not hold good in all.⁷⁷

“Vacant *or* unoccupied” is the phrase in the New York standard today. The Massachusetts standard speaks of vacancy “by the removal of the owner or occupant.” At one time the customary phrase was “vacant *and* unoccupied.” In all probability the person who first inserted these words in a policy did so in deference to the tautological manner of the old conveyancer, who used ten words where one would do, and not with any thought of a possible difference between vacant and unoccupied. However, when the conjunction “and” was used, the courts insisted upon making a distinction between the two terms and held that, to avoid the policy, premises must be both vacant and unoccupied. Force, they held, should be given to both words.

“Vacant” means empty, deprived of its contents, not filled. Furthermore, it involves the idea, not of temporary, but of permanent removal.⁷⁸ The intention of returning must be absent.

On the other hand, the word “unoccupied” is applicable when a temporary removal occurs; for

⁷⁶ *Aurora F. & M. Ins. Co. v. Kranich*, 36 Mich. 289.

⁷⁷ *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598.

⁷⁸ *Thomas v. Hartford Fire Ins. Co.*, 21 Ky. Law Rep. 914, 53 S. W. 297.

example, in the case of a dwelling house, from which the family has removed, leaving a portion of the household goods in the building. It will not be vacant, but occupation is at an end when it is no longer the abode of any living person. A temporary absence of the family will not avoid the policy. They may absent themselves for purposes of health, pleasure, business, or convenience for any reasonable period, if they go with the intention of returning again, and the building insured continues to be their home.⁷⁹

As stated above, unoccupation is but a temporary removal. In determining what constitutes vacancy or unoccupation, it is well settled that the character of the customary use must be considered, especially when the building is not used for residence purposes. For example, a church building kept for use for the purposes for which it is designed, and used as occasion presents, and as the convenience of the congregation may require, and no intent appearing to abandon it for the purposes of its use by the temporary periods of nonuser, even though such periods exceed the forbidden limit in the policy, is not necessarily leaving the church building vacant and unoccupied, nor, perhaps, is the church to be regarded as unoccupied.⁸⁰ Nevertheless, it has been intimated that insurance on a school house is forfeited if the building remains unoccupied during a customary vacation extending over a period of several months.⁸¹

⁷⁹ Quoted in the case last cited.

⁸⁰ *Hampton v. Hartford Fire Ins. Co.*, 65 N. J. Law 265, 52 L. R. A. 344.

⁸¹ *Amer. Ins. Co. v. Foster*, 92 Ill. 334, 34 Am. Rep. 134.

61. Loss by fire—What is fire?—According to a recent authority:⁸² “No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat of the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years to decay and molder away until it becomes again a part of mother earth. Still, we never speak of these processes as fire. And why? Because the process of oxidation is so slow that it does not, in the language of the witness at the trial, ‘produce a flame or glow.’”

Accordingly, it was held that there could be no recovery of fire insurance where wool in fleece was submerged in a flood and thereby suffered from spontaneous combustion, with smoke and great heat, but without a visible flame or glow. But with all deference to this decision, we must admit that a flash is sufficient, without flame or glow, unless we may regard the instantaneous glow of the flash as sufficient glow for the purpose of recovery. For example an explosion of gunpowder is sufficient to make the insurer liable unless the policy excepts loss by explosion.⁸³

62. Same subject—Hostile and friendly fires.—To

⁸² *Western Woolen Mill Co. v. Northern Assur. Co.*, 139 Fed. 637.

⁸³ *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. 356 (Mass.).

make the fire insurance company liable, there must be not only a fire but a fire which was not intended to exist. A fire which is brought into existence, purposely, by the person in control of the premises, is called a friendly fire; for example, a fire in a stove, the slow burning of a cigar in smoking, or the flame of a lamp. Fires which are not friendly and for which the insurance company is liable are called hostile fires.

This distinction is best illustrated by a leading case on the subject.⁸⁴ The plaintiff operated a tobacco factory. His foreman emptied into a stove in one of the rooms the contents of a waste basket, intending to have the contents consumed. He subsequently closed the drafts of the stove, locked up the room and left. An hour afterwards, the chimney was discovered to be on fire, and when the door was opened the rooms were found to be filled with a dense smoke, which caused the damage for which this action was brought. An examination of the chimney showed that the soot in it had become ignited, and the heat had caused accumulated soot and particles of mortar to fall down and choke the flue which threw the smoke into the rooms. The insured was allowed to recover on the theory that, although a fire in a stove may be a friendly fire, a fire in the chimney is a hostile one.

The fact that a fire is where it was not intended to be makes it a hostile fire. If it is where it was intended to be, it is a friendly fire even though greater than was desired. For example, if the wick

⁸⁴ *Way v. Abington Mut. Fire Ins. Co.*, 166 Mass. 67, 32 L. R. A. 608.

of a coal-oil stove is turned up too high and, as a consequence, is caused to smoke, or if a stove becomes too hot and blisters the woodwork, there can be no recovery. If, however, the stove is so hot that it causes the woodwork to take fire, there may be a recovery. In other words, a friendly fire is frequently the cause of a hostile fire for which the insurer is liable.

63. **Same subject—Consequential injury.**—Frequently, the firemen, acting as men of extraordinary prudence, destroy a thousand dollars' worth of property with water, in putting out a fire which has not burned five cents' worth of property. In such a case, to hold the insurance company liable for but five cents would be a virtual denial of protection from loss caused by fire. The New York standard policy allows a recovery of "all direct loss or damage caused by fire."

This brings us to the question of consequential damages. The rule in *Hadley v. Baxendale*, well known to students of the law of damages, restricts the plaintiff in an action for breach of contract to such damages as usually arise, or such as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Must the damages have been in the contemplation of the parties in order that they may be recovered in an action on a fire insurance policy? It is well settled that all the insured must show is that the fire caused the loss; the element of contemplation cuts no figure. This is true for the reason that the insurer has agreed to

make good all loss caused by fire. No doubt, in most branches of the law, the defendant may agree to be answerable for greater consequential damages than *Hadley v. Baxendale* allows. Two of the leading cases on the subject will serve as illustrations.

In *Lynn v. Meriden*,⁸⁵ there was a fire in a wire tower. The fire caused a short circuit, which increased the work of the dynamos. This, in turn, put a strain on certain pulleys, causing one of them to break. Then, this deranged the other machinery, knocked off one ball of the engine and so on, until, finally, a serious wreck occurred, though the fire was confined to the wire tower and but slight damage resulted from actual combustion. However, the court determined that the small fire was the proximate cause of the entire loss and allowed recovery for the wrecking of the plant.

In the *Ermentraut* case,⁸⁶ the policy expressly provided that if the building fell, except as a result of fire, the insurance should cease immediately. The building adjoining the one insured caught fire and, as a result, fell and carried down with it part of the building insured. Though no part of the plaintiff's building was consumed by fire, he was allowed to recover his fire insurance on the ground that his calamity was a direct loss or damage occasioned by fire.

A Pennsylvania court, however, denied recovery for an injury to an insured building, caused by a fire

⁸⁵ *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 20 L. R. A. 297.

⁸⁶ *Ermentraut v. Girard Fire & Marine Ins. Co.*, 63 Minn. 305, 30 L. R. A. 346.

engine, on its way to a fire, in being thrown from its course and colliding with the insured building.⁸⁷

It has been decided, repeatedly, that loss caused by water or other fluids used in extinguishing a hostile fire is a direct loss by fire for which compensation must be made by the insurance company. The insured is also entitled to recover for loss by theft when goods are stolen in the turmoil caused by the fire, unless loss by theft is excepted in the policy.

64. Loss expressly excepted.—The New York standard policy provides that the insurance company shall not be liable “for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or lightning.” The important terms in this clause will be discussed in the order in which they appear.

65. Same subject—Loss by war or riot.—Provisions against loss by invasion and kindred forms of violence became important in the days of our civil war, though their insertion in policies dates back about two centuries. It is said that an invasion necessarily involves organization and military power or force.⁸⁸ The word “insurrection” in a case not involving fire insurance was given a very comprehen-

⁸⁷ *Foster v. Fidelity Fire Ins. Co.*, 24 Pa. Super. Ct. 585.

⁸⁸ *Boon v. Aetna Ins. Co.*, 40 Conn. 575, 585.

sive meaning a few years ago.⁸⁹ It was held to include obstruction of the mails by strikers, in opposition to the laws of the United States, and in defiance of such laws, even though no blood was shed.

A riot, it has been held, existed when a party of men, at night, fired shots and drove away the watchman from the premises insured, without proof of a previous unlawful assembly accompanied by force or violence.⁹⁰

Lord Mansfield's statement in reference to military or usurped power is frequently quoted. He declared that this "meant rebellion conducted by authority, as in the year 1745 when the rebels came to Derby, and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. It must be by rebellion got to such a head as to be under some authority. Usurped power takes in rebellion acting under usurped authority."⁹¹

If the military power sets fire to building A, and the fire then spreads from one building to another until, finally, building D is destroyed, it has been held that the proximate cause of the destruction is military power and recovery must be denied.⁹²

66. Same subject—Loss by order of civil authority.—Three of the leading cases on loss by order of civil authority will serve to define this term. In the first of these,⁹³ the policy apparently exempted the

⁸⁹ *In re Charge to Grand Jury*, 62 Fed. 828 (1894).

⁹⁰ *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. St. 89.

⁹¹ *Langdale v. Mason*, 1 Bennett's Fire Ins. Cas. 16.

⁹² *Aetna Ins. Co. v. Boon*, 95 U. S. 117.

⁹³ *City Fire Ins. Co. v. Corlies*, 21 Wend. 367 (N. Y.), 34 Am. Dec. 258.

insurance company from loss by usurped power, but not from loss by order of civil authority or by explosion. The mayor of the city ordered a building, containing the merchandise insured, blown up with powder to prevent the spread of a conflagration. The court held that even though the mayor acted illegally, there was no element of usurped power, since he acted under color of office. Furthermore, the insurance company was held liable on the ground that the fire was the proximate cause of the loss. It is a matter of regret that the mayor did not order the building torn down instead of blasted with powder, because, as we have seen, an explosion is held to be one form of fire. Hence, it may be said in this particular case that fire was used to prevent the spread of fire. Which fire did the court regard as the cause of the loss?

The answer to this question is of less consequence in view of the *Greenwald* case, in which, notwithstanding the fact that the policy expressly provided that the insurer should not be liable for a loss from explosion, the insurance company was held liable for the destruction of the building by explosion intentionally brought about to stay a fire which was consuming the building.⁹⁴

By analogy, it may be held that, where the building is sure to be destroyed by fire unless destroyed by civil authority, this is a case in which the proximate cause is not the order of the civil authority, but the fire itself. Destruction by civil authority may, with considerable justice, be confined to the

⁹⁴ *Greenwald v. Ins. Co.*, 7 Am. Law Rep. O. S. 282 (Pa.).

class of cases which will be considered in the next paragraph.

Let us assume that the civil authorities set fire to a building, not to prevent a destruction by fire, but because it is an unsanitary tenement house and, by destroying it, seek to cremate germs and thus to prevent the spread of disease. A case similar to this arose in California.⁹⁵ To check a plague of grasshoppers, county supervisors started a fire in a pasture three or four miles from the plaintiff's property. The fire got beyond the control of the authorities and burned the plaintiff's grain. The insurance company was held not liable, on the ground that the loss of plaintiff's grain was occasioned by order of civil authority.

This case differs from our hypothetical case in that the tenement house, in the case assumed, was destroyed intentionally, the grain unintentionally. However, if the insurer is excused in case of unintentional loss, a fortiori should it be excused in case of willful destruction.

67. Same subject—Loss by theft.—We have seen that loss by theft may be regarded as a consequence of fire and included as a direct loss by fire.⁹⁶ To avoid liability on this ground, some policies expressly except this class of losses.

It has been held that such a clause does not exempt the insurer from liability for theft occurring during the necessary removal of the property and that, to cover such a loss, the policy should except theft

⁹⁵ *Conner v. Manchester Assur. Co.*, 130 Fed. 743.

⁹⁶ § 63, *supra*.

"during or subsequent to the fire."⁹⁷ The authorities are in conflict.

68. Same subject—Loss by neglect of the insured.—The provision noted in § 64, exempting the insurer from liability when the loss is attributed to the negligence of the insured at and after the fire, appears to have no reference to negligence of the insured if prior to the fire, even though such negligence causes the loss. It is well settled that negligence prior to the fire is no defense of which the insurer may take advantage, and that it is, in fact, one of the most important risks insured against.

69. Same subject—Loss by explosion.—Loss by explosion⁹⁸ is a term which may be applied to a variety of combinations of circumstances. A fire may cause an explosion, or vice versa. The fire may be either friendly or hostile. The fire or the explosion may occur in an adjoining building and cause fire, or explosion, or damage without fire or explosion, in the building insured. Without attempting to dispose of all of these situations, certain principles which are fairly well settled may be noted.

What is an explosion? A mixture of whisky vapor and atmosphere came in contact with the flame of a gas jet, from which it ignited and, according to the court, exploded in such a manner as to constitute an explosion which prevented a recovery on a fire insurance policy.⁹⁹ An explosion, said the court, may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accom-

⁹⁷ *Leiber v. Liverpool, etc., Ins. Co.*, 6 Bush 639 (Ky.), 99 Am. Dec. 695.

⁹⁸ See the full clause in § 64.

⁹⁹ *United, etc., Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735.

panied by a report. Its existence cannot be settled by any fixed standard.

Fire causing explosion. If a hostile fire in the building insured causes an explosion therein, the fire insurance company may be held liable for the entire loss which results.¹ In this case loss is caused by fire, not by explosion.

However, if a friendly fire causes an explosion, the explosion and not the fire is deemed to be the proximate cause of the loss. For example, where a lighted match, held by an employee of the plaintiff, caused gasoline vapor to ignite and explode, the insurer was held not liable for the ensuing loss.²

Though not without a dissenting opinion, the New York Court of Appeals has held that, if a hostile fire in an adjoining building causes therein an explosion which destroys the plaintiff's building, the plaintiff cannot recover under a policy which provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind.³ The United States Supreme Court apparently sanctions this doctrine. However, it has been suggested that this rule would have worked untold hardship if the great Chicago fire had been caused, not as tradition tells us, by a cow kicking over a lantern, but by a similar disturbance of a small can of nitroglycerine.

70. Same subject—Loss by lightning.—Certain policies make the insurer liable, expressly, for damage caused by lightning. The New York standard

¹ Washburn v. Miami Valley Ins. Co., 2 Fed. 633.

² Mitchell v. Potomac Ins. Co., 183 U. S. 42.

³ Hustace v. Phenix Ins. Co., 175 N. Y. 292, 62 L. R. A. 651.

form of fire insurance policy, however, expressly excludes such liability.

At one time, fire insurance policies covered loss by lightning, which was regarded as "fire from heaven." Today, however, if the policy says nothing at all about loss due to lightning, the fire insurance company is not liable for such losses "because, though caloric may generate electricity, or electricity caloric, yet caloric and electricity are distinct things in nature."⁴

It is not certain what rule would be adopted if lightning caused a fire.

71. Same subject—Fall of building.—If a considerable part of the building falls, the structure will very frequently take fire if there is fire in a stove or furnace. To escape this situation, the New York standard policy provides that, "if a building or any part thereof falls, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease."

Let us assume that the fall is caused by a hostile fire, which causes an adjoining building to fall upon the insured building, which in turn collapses. The rule appears to be that recovery will be allowed,⁵ unless a considerable period of time, for example, an interval of twenty-five days, has elapsed between the fire and the collapse.⁶

72. Cancellation.—In reference to cancellation,

⁴ *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. 356 (Mass.), 57 Am. Dec. 111.

⁵ *Ermentraut v. Girard Fire & Marine Ins. Co.*, 63 Minn. 305, 30 L. R. A. 346.

⁶ *Cuesta v. Royal Ins. Co.*, 98 Ga. 720, 27 S. E. 172.

the New York standard policy provides as follows: "This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice, it shall retain only the pro rata premium."

The right of cancellation has given rise to much litigation. It is frequently the case that either the insured or the insurer desires to cancel the policy. On the one hand, the insured may become doubtful as to the solvency of his insurer, or he may desire to raise money by mortgaging his property to someone who will insist that the property be insured with a certain company with which he is not then insured, or the insured may sell his property and find that the easiest way to get rid of his insurance is to cancel his policy and permit the purchaser to obtain a new one.

On the other hand, the insurer may feel that the decreased water supply of the town in which the property is situated is insufficient to justify the low rate in the policy, or information may come to light as to the bad character of the insured. The small amount returned in such cases bears but little resemblance to the surrender value of a life insurance policy. The latter sum frequently exceeds half of the total amount payable in case of death. Unless

The right to cancel is reserved in the policy, it does not exist.⁷ But even though provision for cancellation is made, it probably does not prevent the parties, by mutual consent, from agreeing upon cancellation in some other mode than that which has been specified in the policy.⁸

When the right to cancel is provided for, the right is absolute. The adverse party cannot question the motives of the one who demands cancellation. However, if, by mistake, the cancellation is made after the loss occurs and in ignorance of the loss, the cancellation will be rescinded in equity.⁹ Moreover, cancellation must be demanded in good faith. This is illustrated by an Illinois case, in which it was held that an insurer had no right to cancel a policy upon learning that a forest fire was approaching the property insured.¹⁰

Form and sufficiency of notice. It is not required that the notice of cancellation be reduced to writing. Notice over the telephone is sufficient.¹¹ The notice must be clear and unequivocal. A mere expression of a desire to cancel is insufficient. No cancellation of part only of the contract can be made. This is probably not a surprise to the student who has already been impressed with the rigid common law rules against splitting up a cause of action. Thus where the insurer had insured for \$10,000 and gave notice of cancellation as to half of the insurance,

⁷ Rothschild v. Amer. Cent. Ins. Co., 70 Mo. 41, 41 Am. Rep. 303.

⁸ Boland v. Whitman, 33 Ind. 64.

⁹ Duncan v. N. Y. Mut. Ins. Co., 18 N. Y. Supp. 863.

¹⁰ Home Ins. Co. v. Heck, 65 Ill. 111.

¹¹ Manchester Fire Assur. Co. v. Ins. Co. of Ill., 91 Ill. App. 609.

the notice was held to be of no consequence.¹² A mere mailing of the notice is not sufficient.¹³ It must be received.

Repayment. If the insurer gives notice of cancellation, when must the return of unearned premium be made? Must it be returned when the notice is given, or, as the policy provides, "on surrender of this policy"? Though there is a conflict of authority, it is interesting to note that the New York Court of Appeals, in a four to two decision, held that it is insufficient for the insurer to give notice that the unearned premium will be returned and then to hold the amount subject to the call of the insured, but that the premium must be returned as a condition of cancelling the policy.¹⁴

Though it may be difficult to defend this decision, in view of the express provision of the policy, it is well to bear in mind that many a person whose home is insured, is doing business on an extremely narrow margin of capital, and that he may not be able to get other insurance until the premium is actually in his hand. However, this is rather an argument in favor of a change by the legislature of the standard form, than a reason for the construction adopted in the Tisdell case.

Surrender of the policy. By the express provision in the policy, the insured apparently has no right to demand the return of unearned premium until he surrenders the policy. What will he do if he has lost it?

¹² Van Tassel v. Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365.

¹³ Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608, 28 N. E. 653.

¹⁴ Tisdell v. N. H. Fire Ins. Co., 155 N. Y. 163, 40 L. R. A. 765.

It must be noticed that the cancellation may be complete before the right to demand the return of unearned premium arises. No doubt the cancellation may be effective even though the return of unearned premium is not even demanded. This question would be of great importance if other insurance is obtained, subject to the condition that it shall be void, if the insured has insurance in force at the time the second is effected. If the policy is lost, unearned premium might be recovered in proceedings analogous to those which may be resorted to when a negotiable instrument or similar papers have disappeared. In all such cases, no doubt, the amount of premium which must be returned depends on the time of cancellation, not on the return of the policy.

73. Measure of damages.—In addition to the various principles already noted in reference to the limits of recovery against the insurer,¹⁵ the following must be observed:

Though the appended rule doubtless applies in the absence of any express provision in the policy, the New York standard policy provides that the company "shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs."

The policy then provides for an estimate of loss by appraisers. The nature and effect of provisions in regard to appraisement is a subject of considerable intricacy. All that can be given here is a key to the problem. If the appraisal is provided for merely to ascertain the amount of the loss, or is made a condi-

¹⁵ Sec. 63.

tion precedent to any liability on the part of the insurer, it is valid and enforceable. If, however, it is agreed that the appraisers are to determine whether or not the insurer is liable, it is unenforceable, because it is an attempt to oust the jurisdiction of the court. In the absence of a valued policy law, to be noted hereafter, the policy fixes the maximum but not the minimum recovery against the insurer. In theory, the insurer may show that the property was worthless when the fire occurred and thus entirely escape liability, though the insured cannot recover more than the amount stated in the policy.

In order to discourage insurance companies from contesting the rights of insured persons too frequently, certain state legislatures allow the insured, if a successful litigant, to recover his attorney's fees and a percentage of the amount of the policy in addition to the full amount of the policy.¹⁶

74. Same subject—Option to rebuild.—The New York standard policy provides that it shall be optional with the insurer “to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind or quality within a reasonable time on giving notice, within thirty days after the receipt of the proof, herein required, of its intention so to do.”

The essential purpose of this provision must be explained. No doubt, it has frequently happened that appraisers have estimated a loss at a figure so high as to be out of all proportion to the value of the

¹⁶ *Farmers' & Merchants' Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. Ed. 821.

property destroyed. In such a case, the insurer is helpless, unless a clause like the above is inserted. In many cases, the insured is much more anxious to get cash than he is to rebuild. Hence, such an option as this, which, it must be noticed, is given not to the insured, but to the insurer, serves as a check upon extravagant claims against insurers, who might otherwise be powerless to defend themselves from virtual extortion.

An election to rebuild, if it is properly exercised by giving notice to this effect to the insured, is irrevocable and supersedes all rights under the policy. The insured must then sue, not for the failure to pay under the policy, but for breach of contract in failing to rebuild.¹⁷ Furthermore, the insured may then recover more than the amount of the policy, the measure of damages being based on the cost of rebuilding, regardless of the amount of the insurance.¹⁸

A further provision prevents abandonment by the insured. Abandonment will be considered in a subsequent chapter on marine insurance.

75. Same subject—Valued policy laws.—In many states, statutes known as valued policy laws have been enacted. For example, in Missouri, it has been provided that in all suits upon policies of insurance against loss or damage by fire, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said prop-

¹⁷ Hartford Fire Ins. Co. v. Peebles' Hotel Co., 27 C. C. A. 223, 82 Fed. 446.

¹⁸ Same case.

erty; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured, the property may have sustained, between the time of issuing the policy and the time of the loss. Such laws, by express provision, generally supersede any agreement of the parties and have been held valid.¹⁹ It must be noted that the full amount of the policy is recoverable only in case of total loss.

As to the advisability of such legislation, much has been said on both sides. On the one hand, it is contended that (1) the fire destroys the best evidence of the value, making it impossible for the insured to prove his case; (2) it is unjust for the insurer to collect excessive premium in perhaps a thousand cases and resist liability in the one case in which it is called on to pay; (3) the insurer may fully protect itself by inspecting the property at the time the insurance is issued and cut down the amount if more is applied for than should be issued. On the other hand, it is urged that (1) the destruction of the evidence may injure the insurer as well as the insured; (2) in many cases, for example, where there is want of insurable interest, the mere receipt of premium does not make the insurer liable, because the agreement is tainted with illegality; (3) the low insurance premiums of today would have to be raised to meet the cost of inspection, if examination of the property must be made in every case in advance of insurance;

¹⁹ *Orient Ins. Co. v. Daggs*, 172 U. S. 557.

[4) there is too much arson already. Such laws increase it.

Total loss. What constitutes a total loss? It is difficult to conceive of the destruction of every single particle of any building by a fire. Though much conflict of authority appears on this question, the following statement of the Minnesota Supreme Court appears very satisfactory: A building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building; that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down, and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as a basis. If he would, then the loss is not total.²⁰

²⁰ Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265.

Even though material of value is left after the fire, if the expense of removing the worthless fragments of the old building would at least equal the value of all the materials left after the fire, it has been held that a total loss exists.²¹

76. Notice and proofs of loss.—The New York standard policy makes provision for notice and proofs of loss to be furnished by the insured after the fire occurs. As to notice, it is provided that, “If fire occur the insured shall give immediate notice of any loss thereby in writing to this company.” As to proofs of loss, it is provided that the insured “within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating” certain matters specified in regard to the loss, and furthermore, it is provided that the loss shall not become payable until “satisfactory proof of the loss” has been received by the insurer. Notice and proofs of loss must not be confused. The former is informal and must be given, at once, after the fire occurs. The latter is a formal document, for the preparation of which two months are allowed.

Immediate notice. What amounts to immediate notice is purely a matter of circumstances. A period of eleven days has been considered too long a time under certain conditions,²² notice fifty-three days after the fire has been held immediate notice where the policy was lost when the fire occurred.²³ However, various family ills of the insured were held

²¹ *Harriman v. Queen Ins. Co.*, 49 Wis. 71, 5 N. W. 12.

²² *Solomon v. Continental, etc., Ins. Co.*, 160 N. Y. 595, 46 L. R. A. 682.

²³ *Trask v. State, etc., Ins. Co.*, 29 Pa. 198, 72 Am. Dec. 622.

is sufficient to excuse a delay of over sixty days, when interrupted by periods of abundant opportunity to give notice.²⁴

Proofs within sixty days. In regard to the furnishing of proofs of loss, the policy expressly provides the exact time within which they must be furnished. Furthermore, it is provided in the New York standard policy that the loss shall not become payable until satisfactory proofs have been furnished.

If, for the best of reasons, sixty-one days elapse before proofs of loss are furnished, shall this provision be regarded as in the nature of a penalty and hence unenforcible, or as a condition precedent to the existence of any right against the insurance company? Though the provisions in the policies vary considerably and are, of course, of vital importance in determining the answer to this question, it is interesting to note that the insured has been excused for a delay of seven years notwithstanding a requirement of proofs in sixty days.²⁵ At the other extreme, where a railroad was insured against liability for fire caused by its engines, it was held necessary to furnish proofs within sixty days after the fire, even though the insured did not know it was liable until after the sixty days had expired.²⁶

A conflict of authority exists as to the necessity of receiving the proofs of loss within the prescribed time if duly mailed within the sixty-day period. By the weight of authority, it appears impossible for the insurer to draw up the policy in such a way that an

²⁴ Parker v. Farmers' Fire Ins. Co., 179 Mass. 528, 61 N. E. 215.

²⁵ Kirk v. Ohio Valley Ins. Co., 8 Ohio Dec. 182; 6 Wkly. Law Bul. 200.

²⁶ Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420.

absolute forfeiture results from failure to furnish proofs of loss within the sixty-day period, regardless of excuse for delay. Such a rule may be defended on the grounds that public policy forbids the enforcement of a penalty and that certain vested rights accrue to the insured when the fire occurs.

Satisfactory proofs. It is required that "satisfactory proofs" be furnished. Satisfactory proofs, as defined by the authorities, are proofs with which the insurer should be satisfied, and if they comply with the requirements in the policy they will generally answer the purpose.²⁷ And moreover, it is a very easy matter for the insurer to waive his right to object to proofs of loss by failure to reject them within a reasonable time after he has received them.

Effect of statements in the proofs. The statements contained in the proofs of loss are not evidence against the insurer for obvious reasons, nor are they conclusive evidence against the insured. The insured may show that he made such statements through mistake. However, such a statement may be strong evidence against the insured, because it may be in the nature of an admission against interest, or it may mislead the insurer and thus estop the insured.

77. Other requirements subsequent to loss.—The New York standard policy makes it compulsory for the insured, if required, but not otherwise (1) to furnish verified plans and specifications of any buildings, fixtures, or machinery destroyed or injured; (2) to furnish the certified statement of the magis-

²⁷ Flynn v. Mass. Ben. Assn., 152 Mass. 288, 25 N. E. 716.

ate or notary, living nearest the place of fire and disinterested and unrelated to the insured, as to the honesty of the claim of the insured; (3) to exhibit a designated employee of the insurer the property insured; (4) to submit to examinations under oath by any designated employee of the insurer; (5) to produce his books and papers for examination and allow copies to be made therefrom. Such requirements have been liberally construed with a view to the protection of the insured.

The clause which appears to cause the greatest amount of effort on the part of the insured is that requiring him, on request, to furnish a magistrate's certificate. One court has held such a provision void, because it is not reasonable to require the insured to furnish such a certificate in view of the fact that the insured cannot compel the magistrate to act in the matter.²⁸ Moreover, the courts are unwilling to determine, by exact measurement, if the magistrate who furnished the certificate was in fact a few inches further removed from the property destroyed than any other official of the same dignity.²⁹ Furthermore, it has been held that the certificate of the next nearest magistrate is sufficient, if the nearest refuses to act.³⁰

78. Time within which action must be commenced.—The New York standard policy provides that "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the

²⁸ *German-Amer. Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267.

²⁹ *Williams v. Queen's Ins. Co.*, 39 Fed. 167.

³⁰ *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152, 26 Pac. 103.

insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.”

Validity. This provision is generally held to be valid, though in one state it has been held contrary to public policy and therefore void.³¹ Probably in all states, if the conduct of the insurer in a particular case renders it unreasonable, it will not be enforced,³² or, at least, in such a case, the time for bringing suit will be regarded as having been extended.³³ On the other hand, such a provision as this has been held binding even against an infant who has effected insurance, so that he cannot wait to bring suit within twelve months after his majority.³⁴ However, it must be observed that it is provided by statute, in certain states, that any agreement upon a different time for the commencement of actions from the time provided in the general Statute of Limitations shall be null and void as to such agreement.³⁵ Such a provision does not except insurance contracts but was unquestionably designed to include them.

When time commences to run. We have seen that it is expressly provided that the action must be commenced within twelve months after the fire, not after the appraisal is completed, or the amount of damage ascertained. But the policy requires the insured to do many things after the fire, such as the preparation and forwarding of proofs of loss. Nevertheless, it is

³¹ *Miller v. Ins. Co.*, 54 Neb. 121, 74 N. W. 416.

³² *Fullam v. N. Y. Union Ins. Co.*, 7 Gray 61 (Mass.), 66 Am. Dec. 462.

³³ *Fritz v. Brit. Am. Assur. Co.*, 208 Pa. St. 268, 57 Atl. 573.

³⁴ *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, 64 L. R. A. 79.

³⁵ Rev. St. Kansas, 1909, Sec. 5610.

generally held that delay due to the absorption of the time of the insured in looking after such details does not prevent the time from commencing to run as soon as the fire is extinguished. It must be noted that many policies, particularly in former days, required the action to be brought within twelve months next after the loss. A distinction between fire and loss has been made. Loss, it is held, does not occur until the proof of loss has been duly filed and the right of action against the insurer is complete. Accordingly, the insured is allowed a considerably longer time by this holding.³⁶ Many courts have shown an inclination to revert to this rule even though the policy speaks of twelve months after the fire and not after the loss.³⁷ Such decisions, though doing violence to the language of the policy, are frequently based on elements of waiver or estoppel against the insurer and might be defended, particularly where the period provided is very short, on the ground of the repugnancy of such a provision to the purpose of the contract.

³⁶ Steen v. Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297.

³⁷ Sample v. Ins. Co., 46 S. C. 491, 47 L. R. A. 696.

CHAPTER X.

LIFE INSURANCE.

79. **The life insurance business—The old line company.**—Two classes of life insurance organizations are known in the United States, old line companies and mutual benefit associations. What is familiarly known as an old line life insurance company may be described as one in which there are no social features and nothing, in fact, but the elements of a strictly commercial concern. The term “old line” is used to designate it as the conservative organization sticking to the methods of business in vogue before the rise to importance of the mutual benefit association. For many purposes, it is only the old line company which is regarded as being, in a strict sense, a life insurance company.

Three forms of organization are familiar in old line insurance circles: stock, mutual and mixed companies. A stock company, created for the purpose of doing a life insurance business, differs in its organization in no essential detail from the ordinary private corporation. The corporation issues capital stock to shareholders who control the affairs of the company, the policyholders being little more than creditors of the corporation. The mutual company is a popular form of organization in the United States. The company possesses no capital stock and hence has no stockholders. The policyholders alone

et as stockholders. They receive all the dividends and elect the directors. All who insure in the mutual companies thereby become members of the organization. The student must not confuse mutual life insurance companies with mutual benefit associations. All mutual benefit associations are mutual companies, in so far as their control is concerned, but all mutual companies are not mutual benefit associations. For example, the New York Life Insurance Company is a mutual company, but not a mutual benefit association. The third form of organization is the mixed company, which partakes of the features of both stock and mutual companies. There is a limited number of stockholders who are not in exclusive control, but, in many cases, share the right of election of officers with the policyholders.

80. **Same subject—The mutual benefit association.**—The mutual benefit association has assumed many forms in this country, from the perfectly organized corporation of immense financial proportions to the society of but a handful of employees in a particular business establishment. One of the most prominent characteristics of these organizations, though not an inseparable one, is the payment of losses by assessments, not by premiums as in the old life companies. Hence, the mutual benefit association is frequently called an assessment company. Assessments are levied to meet losses after they occur. If no one dies for ten years, no one is assessed during that time. On the other hand, premiums are fixed in amount and are payable whether or not any of the members have died since the company was or-

ganized. Mutual benefit associations are frequently referred to as fraternal insurance associations, though a distinction may be drawn between the two and, for the sake of clearness, we may also compare them with mutual life insurance companies: (1) Mutual life insurance companies have as members only policyholders, but collect premiums, not assessments. (2) Mutual benefit associations, though controlled solely by their members, collect assessments, not premiums. (3) Fraternal insurance companies possess the characteristics just stated in regard to mutual benefit associations, but have many social features attached, particularly the usual accompaniments of the lodge system with secret rituals and ceremonials.

The distinction between the mutual benefit and old line company is of great importance, owing to the fact that stringent rules and regulations exist in reference to the conduct of the life insurance business. Many mutual benefit associations have succeeded in convincing the courts and legislatures that they are not life insurance companies at all, and hence need not comply with the aforesaid regulations. The result has been that many of these societies have escaped regulation almost entirely, or have been confronted with a separate group of statutes designed to control their management.

Starting with this distinction between the old line and mutual benefit company, certain differences in terminology, frequently in use, must be noted. The insured in the old line company is a policyholder, in the mutual benefit association a member. The pol-

Policyholder receives a policy, the member a certificate of membership. To protect one's policy from forfeiture, one must pay premiums; to prevent loss of membership, one must pay assessments. The head of the old line company is known as President; the head of a fraternal order is the Worthy Commander, or, perhaps, the Supreme Potentate, or Matchless Dictator. It has been suggested, not unwittily, that the legal powers of the head of a fraternal order over its members must not be determined by the title of his office. On the death of the insured in an old line company, the beneficiary receives the insurance; on the death of a member of a fraternal order, the beneficiary or those dependent on the member receive death benefits.

81. **Payment of premiums.**—A life insurance contract is generally regarded as unilateral. The insurer promises to pay the insurance on the death of the insured, if the insured will pay the premiums as they fall due. The insured does not agree to pay anything, at least nothing beyond the first premium, although persons insured, who have given their notes in payment of premiums, have been held liable in many cases, in actions on such notes. Moreover, it has happened frequently that an insurance agent has advanced a premium and is compelled to sue to get his money back. Clearly, such actions are not maintainable because of any provision in the policy, but by virtue of subsequent or collateral agreements.

Most of the thousand and one decisions in regard to the payment of insurance premiums are in exact accord with the general rules governing payment,

as to the time when payment must be made if the day of payment falls on a legal holiday. One peculiar situation of great importance has arisen: X's quarterly premium falls due on October 29, and amounts to eleven dollars and seventy cents. At the time, there is on hand in the office of the company a dividend due to B on the same policy, amounting to twelve dollars. Must the insurer automatically transfer dividends to the payment of premiums and thus avoid a forfeiture, even though X has given them no direction to do so, and although the insurer has not agreed to make the transfer without a request from X? Most of the reported cases are based on the ground of waiver or agreement and hence do not enable us to determine the answer to this question. There is an intimation in an Illinois decision that the retention of the dividend must be regarded as payment on the premium.³⁸ Hence, it would seem that these reciprocal claims compensate each other.

82. Payment of assessments.—What penalty can be imposed for failure to pay assessments to a mutual benefit association? Clearly, the member may be expelled. But can he be compelled to pay in an action at law? A conflict of authority confronts us here. Since the theory on which assessments are based is that they go to pay for protection already received, the same court might hold, consistently, that assessments, though not premiums, may be recovered in legal proceedings.

Change of assessments. Much bitterness has ever arisen over attempts on the part of mutual benefit

³⁸ Chicago Life Ins. Co. v. Warner, 80 Ill. 410.

associations to raise their assessments. It is well settled that the member on entering the association may be required to submit to future amendments of the by-laws in reference to assessments, including those raising rates. But suppose that he makes no such agreement? In many cases, it has been held that, unless the member agrees to be bound by future by-laws, he cannot be forced to pay a higher rate by such a change.³⁹

83. **Effect of nonpayment.**—In the absence of any provision in the policy to the contrary, failure to pay insurance premiums, when due, works a forfeiture of all rights of the policyholder. However, one of the most commendable features of modern life insurance is the provision now made for reinstatement of the insured within a certain time upon paying a lapsed premium,⁴⁰ or, much more frequently, for a cash surrender value, a cash loan value, paid-up insurance or extended insurance after the payment of the first two or three premiums. These terms may be illustrated by the provisions of a policy actually issued to a person thirty-five years of age, in the amount of \$10,000, by an eastern company. The insured was required to pay each year until his death, \$281.10, as premium, to the insurer. The insurer agreed, in addition to paying the annual dividends, to grant the insured the following options: (1) To borrow from the company \$320 at the end of three years, up to \$4,250 at the end of twenty-five years, with interest at five per cent. This is the

³⁹ *Covenant Mut. Life Assoc. v. Kentner*, 188 Ill. 431, 58 N. E. 966.

⁴⁰ *Lovick v. Provident Life Assn.*, 110 N. C. 93, 14 S. E. 506.

cash loan value. (2) The same amounts, respectively, were to be paid on the surrender of the policy. This is the cash surrender value. (3) The insured might surrender his policy at the end of three years and receive, in return, insurance in the amount of \$720 or at the end of twenty-five years insurance in the sum of \$6,380. This is called paid-up insurance. It must be noted that while the insured would thus escape all liability for future payments, this sum does not become due until the death of the insured. In other words, the time for the payment of the insurance remains, but the amount is decreased. (4) In place of paid-up insurance, the insured, at the end of three years, may have the original amount, \$10,000, extended for three years and seven months, or for fourteen years and eleven months, at the end of twenty-five years. This is called extended insurance. Thus, it will be seen that extended insurance differs from paid-up insurance in being a reduction in time, but not in amount.

Extended insurance remains the same in amount as the original policy, though the time is cut down. There appears to be no good reason for calling the one extended and the other paid-up. Both, in a sense, comply with both appellations. However, the terms have become fixed. Owing to the fact that the insured must exercise his option within a certain time after his last premium falls due, difficulty has arisen where he fails both to pay and to exercise his option, and leaves the company at sea as to which one of his privileges he desires to exercise.

In nearly every state it is settled that time is of

the essence of such an agreement and that if the insured fails to exercise his option within the time prescribed, all of his rights become forfeited. However, time is not of the essence of such a contract in Kentucky, according to precedent.⁴¹ In the Kentucky decision, the attorney for the insurance company failed, in his argument, to fire his best gun, or at least, made use of his weakest. It was argued that the delay in making the demand imposed upon the insurer the burden of unnecessary bookkeeping, and that forfeiture was therefore proper. The court retorted with a quotation from an earlier Kentucky case, as follows: "The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny to the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice, or authority, and cannot be sanctioned in a court of equity."

A much better reason for holding contrary to the Kentucky court is based on the fact that, by holding off for several months after the policy becomes forfeited, the insured is enabled to play fast and loose, by demanding extended insurance if, in the meantime, his health fails, or paid-up insurance if he sees, later, that he will probably live beyond the period of extension. Such a principle, carried to a logical extreme, would bankrupt many insurance companies. To use a popular expression, the insured is allowed to bet on a sure thing, under the Kentucky rule.

⁴¹ *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 53 L. R. A. 378.

84. **Excuses for non-payment.**—The sickness, insanity, or death of the insured is no excuse for his failure to pay his life insurance premiums. The only excuses recognized are those arising by operation of law, or by the act of the insurer. Among the latter excuses are the insolvency of the insurance company, resulting in a suspension of payment, waiver and estoppel. Among excuses arising by operation of law, the most perplexing is war between the country of which the insurer is a resident and that of the insured. For example, many persons residing in Georgia were insured in New York companies at the outbreak of the Civil War. War suspends and makes illegal commercial intercourse between the citizens of the belligerents, whether such persons are combatants or non-combatants. Furthermore, our Civil War was, for this purpose, as much a war between independent nations as the Russo-Japanese war. After the close of the Civil War, much litigation arose and three lines of authorities developed.

(1) Under the Connecticut rule, the contract terminated absolutely with the outbreak of the war and was not, for any purpose, revived by the cessation of hostilities. One of the grounds upon which this rule is based is, that the premium could have been paid, lawfully, by a change of residence to a northern state or through a northern agent.⁴² If the rule of international law laid down is correct, then this decision is unquestionably sound. If, however, the court went wrong in its conception of international

⁴² *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 472, 19 Am. Rep. 495.

law, this rule in insurance appears harsh, and results in a great and undeserved gain to life insurance companies. Those who hope that the commercial classes will eventually demand the abolition of war can hardly expect that the life insurance companies will be encouraged by such a rule to join them in making the demand.

(2) Under the New York rule, the contract revived at the close of the war upon the tender of overdue premiums.⁴³ Here again,⁴⁴ betting on a sure thing is countenanced. A Confederate veteran, half dead at the close of the war, could crawl to the office of the company and revive his policy. The one who escaped sound and whole would find it cheaper, in many cases, to take out new insurance. If the death of the insured occurred during the war, this rule allowed a recovery of the amount of the policy minus the premiums due.⁴⁵

(3) The third rule, adopted by the United States Supreme Court, appears most just to all concerned. The policy is forfeited so that it cannot be revived, as under the New York rule. However, the insured is entitled to the equitable value of the policy, arising from the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy, when the forfeiture occurred.⁴⁶ In other words, the insured receives a sum about equal to the reserve value of the policy,

⁴³ *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522.

⁴⁴ See § 81.

⁴⁵ *Martine v. Internat. Life Assur. Soc.*, 53 N. Y. 339, 13 Am. Rep. 529.

⁴⁶ *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

the fund which was laid aside to meet this anticipated loss.

85. Notice of premiums due.—The following principles may be deduced from the endless litigation as to the duty of the insurance companies to notify the insured of the maturity of the premium. (1) In the absence of an agreement to do so, the insurer is not bound to give the insured notice of the fact that a premium is due, if the amount and time of payment are certain. (2) If the association is doing business on the assessment plan, notice is generally required to fix the liability of the insured. It may be regarded as implied in the contract. (3) The insurer may, by waiving its rights to receive payment without notice, or by its course of business, make such notice necessary. (4) By statute, it is provided in many states that notice must be given. Certain courts have held that the insured cannot waive his statutory right to receive notice, even by express agreement.⁴⁷ (5) Where the insurer agrees to deduct from the premium a sum equal to the amount of the dividends and allow the insured to tender only the balance, the insurer must give notice of the amount of such balance.⁴⁸ Here, notice is virtually implied from the agreement.

86. Suicide.—Let us assume that X takes out life insurance in favor of his own estate and that the policy makes no provision for death by suicide. If X commits suicide, can his personal representative recover the insurance? In the leading case on the

⁴⁷ *Griffith v. N. Y. Life Insurance Co.*, 101 Cal. 627, 40 Am. St. Rep. 96.

⁴⁸ *Phoenix Ins. Co. v. Doster*, 106 U. S. 30.

subject, the Ritter case,⁴⁹ the United States Supreme Court denied recovery for two reasons: (1) It is not contemplated that payment should be made in such a case. (2) Even if the insurer agreed to pay in case of suicide, such an agreement would be contrary to public policy. Though, in the Ritter case, the insurance was payable to the personal representative of the insured, a later Federal decision extends the principle to insurance payable to a beneficiary other than the insured.

The rule in the Ritter case has been repudiated by the great weight of authority, particularly in cases in which a third person has been designated as beneficiary. However, it is generally agreed that the insurance cannot be recovered if the insured takes out insurance with the intention of committing suicide then present and proceeds to accomplish his purpose. The defense in such a case is based on fraud.⁵⁰

87. Suicide excepted.—As soon as the life insurance companies realized the effect of the rule which prevails in the absence of a stipulation in reference to suicide, many of them inserted express provisions excusing the company from all liability in case of the death of the insured “by suicide,” “by his own hand or act,” “by self-destruction,” or, if he “takes his own life.” Though the courts declared such a provision to be perfectly valid, many of them rendered it almost worthless to the insurance companies by holding that suicide committed while the insured

⁴⁹ Ritter v. Mutual Life Insurance Co., 169 U. S. 139.

⁵⁰ Smith v. Society, 123 N. Y. 85, 9 L. R. A. 616.

was insane was not excepted under these phrases.⁵¹ It was an easy task for the attorneys for the plaintiff, in an action to recover the insurance, to convince the jury that the insured was insane when he killed himself. Suicide is frequently the result of an unbalanced mind.

Furthermore, a liberal rule in favor of the insured was adopted by most of the American courts in determining that insanity existed. For example, where the plaintiff's husband took poison which caused his death, the United States Supreme Court held that there could be no recovery if the insured possessed his ordinary reasoning faculties when he killed himself, but that a recovery would be allowed if his reasoning faculties were so far impaired as to prevent ability to understand the moral nature of his act, even though he intended to kill himself, or if the suicide was the result of an insane and irresistible impulse.⁵²

88. Exception of suicide, sane or insane.—Many insurance companies finally stipulated that they should not be liable in case of suicide, whether the insured was sane or insane when he killed himself. This provision was also held to be enforceable and left but one door open for the recovery of insurance in cases in which the insured might be regarded, in a popular sense, as having committed suicide. This avenue of escape lies in a strict construction of the term "suicide." What is suicide? If one, by mistake, drinks poison for coffee, and dies as a conse-

⁵¹ *Blackstone v. Standard Life & Acc. Ins. Co.*, 74 Mich. 592, 3 L. R. A. 486.

⁵² *Life Ins. Co. v. Terry*, 15 Wall. 580 (U. S.).

quence, has he committed suicide? Or if he becomes a raving maniac and beats his brains out in the strong ward, has he committed suicide?

In one case, the insured was found dead, with a bullet through his brain. There seems to have been no dispute but that the fingers of the insured pulled the trigger that started the bullet on its journey. It was left to the jury to determine whether or not the insured had mind enough to know that, if he fired the pistol ball through his head, it would be likely to produce death.⁵³

Though this decision appears to stretch to the utmost the rule allowing a recovery, the essential idea appears sound. Unless there was an intention to destroy one's life, popular usage of the word "suicide" would justify us in saying that suicide did not occur. Accordingly, many courts have held that there can be no suicide without a knowledge on the part of the insane person of the physical nature of his act. However, many decisions to the contrary have appeared. Apparently, for the purpose of extending the exemption of the insurance company to cases wherein the insane person is unconscious of the physical nature of the act of self-destruction, certain companies have inserted in their contracts the following clause: "If the member shall die by any means or act which, if used or done by such member while in possession of all natural faculties, would be deemed self-destruction," the certificate shall be void. Such a provision has been upheld.⁵⁴

⁵³ *Mutual Ben. Life Ins. Co. v. Daviess' Exrs.*, 87 Ky. 541, 9 S. W. 812.

⁵⁴ *Cotter v. Royal Neighbors*, 76 Minn. 518, 79 N. W. 542.

89. Death at the hands of justice.—If the insured suffers capital punishment, can the beneficiary recover the insurance? In such a situation the insurance company is not liable, if there is a clause excepting recovery in case of death at the hands of justice, or if no stipulation on the subject appears. Probably, it is against public policy for the insurer to agree, expressly, to pay in this case. Few cases on this point have arisen, because few people who are electrocuted or hanged through legal process have sufficient means or foresight to insure their lives. In the leading case on the question, it was contended before the United States Supreme Court that the insured was not guilty and should not have been convicted. The court declared that such an argument is without merit and that a miscarriage of justice is a risk which it would be against public policy for insurance companies to carry.⁵⁵

90. Death in violation of law.—Certain life insurance policies contain a clause declaring the policy void in the event that the insured shall die “in known violation of any law of these states or of the United States, or of any other country which he may be permitted under this policy to visit or reside in.” It is generally agreed that suicide is not included as death in violation of law. Though attempts to commit suicide, or suicide at common law may be regarded as criminal, they are not violations of law for this purpose.

It is generally agreed that the law violated must be a criminal law to excuse the insurer, though it is

⁵⁵ *Burt v. Union Cent. Life Ins. Co.*, 187 U. S. 362.

difficult to see how the word "criminal" can be read to the plain provision of the policy. A Missouri court has gone farther and has intimated that the policy is not avoided unless the insured is in the act committing a *felony*.⁵⁶ However, the decision is based on the rule of construction which requires a clause to be construed in the light of the company keeps. Other exceptions closely associated with the one in question referred only to felonies. However, a later decision in Missouri denied recovery where the insured had committed a crime which was less than a felony, though the court intimated that every misdemeanor amounting to a breach of the peace will not be considered a violation of law which will avoid the policy.⁵⁷

In innumerable cases, the insured has been killed while committing an assault, or while retreating from a fight. In the former case, recovery is generally denied, though not in the latter case, if the retreat was made with the intention of withdrawing from the combat.

Death not caused by violation. In one city in the United States, the home of a religious colony, it is said to be criminal to smoke on the street. Suppose that the insured while smoking as thus forbidden, walks across the street, falls accidentally into a manhole and is killed. Has he met death in violation of law? It is well settled that, for this purpose, he has not. For example, where the insured was killed while carrying a concealed weapon, the insurance

⁵⁶ Harper's Admr. v. Phoenix Ins. Co., 18 Mo. 109.

⁵⁷ Wolff v. Conn. Mut. Life Ins. Co., 5 Mo. App. 236.

may be recovered unless the death was the natural result of carrying the weapon.⁵⁸

According to one line of authorities, the death must occur while the insured is in the very act of committing a crime. If the insured loots a cash drawer, starts to escape and is killed with the goods on him, before he reaches the outer door, he has not met death in violation of law, even though he was killed by a policeman. At least, such was the decision in Nebraska,⁵⁹ apparently on the theory that carrying away the loot is not a crime, and that the crime was a thing of the past.

The United States Supreme Court has handed down a decision which gives much less cause for congratulation to violators of the law. The insured was driving a race horse for money, in violation of law. A collision occurred. Then the insured jumped to the ground, and tried to stop his horse, but was killed in trying to get hold of the reins. Though racing for money may be illegal, stopping a race horse is not. However, recovery was denied on the ground that the illegal act and the death were but parts of the *res gestae*, forming one continuous transaction.⁶⁰

⁵⁸ Jones v. U. S. Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485.

⁵⁹ Griffin v. Western Mutual Benevolent Assn., 20 Neb. 620, 31 N. W. 122.

⁶⁰ Insurance Co. v. Seaver, 19 Wall. 531 (U. S.).

CHAPTER XI.

MARINE INSURANCE.

91. **The marine insurance business.**—Though fire insurance covers but a single form of loss, destruction of property by fire, and life insurance becomes payable on the happening of but one event, death, it is otherwise in the case of marine insurance. If the “perils of the sea,” fire, pirates or capture cause loss of a vessel or her cargo, the owner is entitled to indemnity, if he has procured the customary form of marine insurance.

The most discouraging feature of American marine insurance is the fact that probably more than half of it is in the hands of foreign companies. Moreover, certain extensive ship owners, whose fortunes are not all in one bottom trusted, find that it is cheaper to lose a ship occasionally than to carry insurance on all of their vessels, and therefore carry no marine insurance.

92. **The risks assured.**—In the United States, each marine insurance company has its own form of policy. However, there is substantial uniformity. Touching the adventures and perils which the said Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque reprisals,

takings at sea, arrests, restraints and detainments of all kings, princes or people of what nation, condition or quality soever, barratry of master and marines, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof."

Thus the policy covers losses due to the perils of inanimate forces and the hostile acts of man. Ordinary wear and tear is not a peril of the sea, but an inevitable accompaniment of navigation and is therefore not covered by marine insurance.

Endless difficulty has arisen here, as in many other branches of the law, in determining what is the proximate cause of a given loss. It is agreed that the insurer is not liable unless the peril insured against is the procuring or efficient cause of the loss. For example, during our Civil War, Confederate troops put out the light on Cape Hatteras. This caused the captain of the vessel insured accidentally to wreck the ship. Part of the cargo was saved, part could have been saved but for the conduct of Confederate soldiers. The rest was lost with the ship. Though the cargo was insured "free from the consequences of hostilities," the insured was allowed to recover for the part of the cargo lost with the ship. The proximate cause of the loss of this portion, the English court held, was the wrecking of the ship not the putting out of the light.⁶¹

All other perils. The very comprehensive assumption of risk as to "all perils, losses and misfortunes"

⁶¹ *Ionides v. Univ. Mar. Ins. Co.*, 14 C. B. (N. S.) 259 (Eng.).

been of much less assistance to persons insured in such language seems to indicate. Under the well-known rule of construction, *noscitur a sociis* (it is known from its associates), this phrase must be interpreted in the light of the perils enumerated⁶² and therefore includes only risks similar to those expressly covered.

Further limitations upon the risks insured against are embraced within the doctrine of "implied warranties," a term peculiar to marine insurance.

§ 93. Implied warranties.—It is customary to say that in all marine insurance contracts there are three implied warranties by the insured: (1) that the vessel is seaworthy, (2) that there shall be no deviation, and (3) that the vessel shall not, with the consent of the insured, embark in a venture tainted with illegality. Objection has been urged to the appellation "implied warranties," and it is contended that these are really conditions precedent to the attaching of the risk and should, therefore, be called "conditions," not warranties. Nevertheless the term "implied warranty" is fixed in marine insurance.

Seaworthiness. If a vessel be insured under a voyage policy, that is, for a given voyage, the insurer is not liable for any loss unless the vessel was seaworthy at the time she commenced her voyage. In England no such condition is implied in a time policy; that is, insurance for a definite period. In this country there is a conflict of authority on the question.⁶³

Deviation. Any deviation avoids the policy even

⁶² Compare § 90.

⁶³ *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93.

though the vessel is in no way injured by the act. A striking fact is this, that even though the vessel keeps in the straight and narrow path prescribed in the policy she is guilty of deviation if she makes unreasonably slow time.⁶⁴ On the other hand, she may depart from her path without deviating in this technical sense if forced to do so by stress of weather or circumstances, for example, danger of capture.

Illegality. But one extraordinary ruling in regard to illegal ventures is worthy of mention. In England and certain American jurisdictions trading ventures involving the breach of foreign revenue laws are not regarded as coming within this provision, and therefore insurance in such cases may be recovered.⁶⁵

94. **The two classes of average losses.**—The doctrine of general average in admiralty law may be illustrated as follows: A piano owned by X and duly insured is stored in the same warehouse with another piano owned by Y and also insured. A fire destroys X's piano but leaves Y's unharmed. X's insurer must stand all the loss. Where, in marine insurance, the loss falls entirely upon the one, out of several, who have property on board the same vessel, such a loss is called a "particular average loss."

General average losses are also recognized in marine, though not in fire insurance, as when the master of a vessel is forced to sacrifice a hundred bales of cotton, all belonging to X, in order to save the ship with a remaining hundred bales on board

⁶⁴ *Arnold v. Pacific Mutual Ins. Co.*, 78 N. Y. 7.

⁶⁵ *Parker v. Jones*, 13 Mass. 173.

longing to Y, the loss will fall proportionately on X's and Y's insurance companies, and on the other interests in the common venture. The exact scope of the doctrine of general average loss is a matter of considerable difficulty and prolixity in admiralty law.

95. Total losses, actual and constructive.—Actual total loss in marine insurance is virtually the same as fire insurance. When the vessel is rendered worthless to the insured she becomes a total loss. She may sink without being a total loss, if she can be raised at an expenditure of less money than she is worth.⁶⁶ On the other hand, she may stay on the surface and yet be reduced to a worthless mass.⁶⁷ Valued policies frequently exist by the agreement of the parties in marine insurance. These have been explained in connection with fire insurance.⁶⁸ Probably our American legislators borrowed the idea of valued policy laws in fire insurance from this practice of marine insurance companies.

Constructive total loss. In the United States, a constructive total loss exists when the injuries insured against have rendered the ship worth less than fifty per cent of what her value would be if restored to the condition in which she was before she was injured. This "fifty per cent rule" is not accepted in England. There, constructive and actual total losses differ but slightly. The English rule might be called a hundred per cent rule. The cost of recovery must exceed the value when recovered.

⁶⁶ Sewall v. U. S. Ins. Co., 11 Pick. 90 (Mass.).

⁶⁷ Bullard v. Roger Williams Ins. Co., Fed. Cas. No. 2, 122.

⁶⁸ See § 75.

96. **Abandonment.**—In case of constructive total loss the insured may recover on the basis of the partial loss sustained, or he may abandon the damaged ship to the underwriter and recover the same amount as in case of a total loss. This doctrine of abandonment is peculiar to marine insurance, though, out of abundant caution, many fire policies expressly forbid abandonment. The insured is thus given an option to abandon or not, as he sees fit. The insurer is given no election, though in many cases the marine insurance company declines to accept the ship when abandoned. In doing so it acts at its peril. If the insured can show that abandonment was proper, the insurer can be held as for a total loss, though only for the partial loss if the refusal was proper. It is obvious that, on abandonment, the insurer, by virtue of the doctrine of subrogation, succeeds to the rights of the insured against any third party who may be responsible for having caused the loss of the insured.

97. **One-third off new for old.**—If the side of an old vessel is crushed in there may be but one practicable way to repair her. Let us assume this mode of repair requires the use of new materials which will make her worth more than before the accident. Accordingly, the rule is established that in case of partial loss, “one-third off new for old” is allowed the insurer. For example, if it costs \$300 to repair her, the insurer is liable for but \$200 regardless of whether the ship has been sailing for one or a hundred years.⁶⁹

98. **Sue and labor clause.**—If the owner of a house

⁶⁹ *Humphreys v. Union Ins. Co.*, Fed. Cas. No. 6871.

ars that an extraordinarily hot fire in his stove may cause the house to burn and proceeds to drench the room with water to prevent the fire, he can recover nothing from the insurer of the house and furniture because no hostile fire has existed.

In marine insurance the rule is otherwise. If it is necessary for the insured "to sue, labor, and travel for, in, and about the defense, safeguard and recovery" of the property insured, the insurance company agrees to indemnify the insured as in case of a loss in an equal amount. Under this clause, the insurer may be liable for more than the amount stated in the policy, where a loss and the expenses of the attempt to avoid the loss exceed the stated amount of insurance.

There can be no recovery under this provision unless the work was done by the assured or one in his employment, and to prevent or lessen a loss for which the insurer would otherwise be liable.⁷⁰

⁷⁰ *Kidston v. Empire Marine Ins. Co.*, L. R. 2 C. P. 357 (Eng.).

CHAPTER XII.

ACCIDENT INSURANCE.

99. **The accident insurance business.**—The accident insurance business originated in England and the United States in the middle of the nineteenth century. At first it was designed, primarily, to insure against risks of travel, and grew in importance along with railroads and other means of rapid transportation, together with the wide use of dangerous machinery. The significance of this branch of insurance may be judged by the fact that accident companies received over twenty million dollars in premiums here in U.S. as far back as 1911. Though Lord Campbell's Act and kindred legislation have provided for the recovery of damages for death by wrongful act, the amount of recovery is generally limited. Many items of loss are not included in fixing the damages in proceedings under these acts. Accident insurance is a necessary supplement for adequate protection.

Endless litigation has resulted from the attempt to define the term "accident" and the excepted cases which the insurance company does not pretend to cover.

100. **What is an accident?**—It is not easy to determine what is and what is not an accident even in the popular sense of the term. It is well said that acci-

ents are always happening to careless people, though but seldom to persons of great caution. A reconciliation of the authorities is out of the question. Accidents cannot be very accurately classified because infinite in variety and number. Where the insured took out accident insurance and then met death by lynching at the hands of a mob, his death was deemed the result of accident in Mississippi.⁷¹ In like manner, where the insured intentionally trimmed a corn, but unexpectedly caused blood-poisoning, which resulted in his death, it was held that his death was caused by accident.⁷² Taking poison by mistake has been held to be one form of accident, though if one intends to take as much as he actually took, but is mistaken merely as to the effect of the size of dose taken, no accident has occurred.⁷³ Where one, sick and half asleep, became entangled in his nightshirt in an effort to dress hurriedly, and broke a blood vessel in his attempt to extricate his head, recovery was denied on the ground that the injury resulted from voluntary movements.⁷⁴ In like manner, the insurer was held not liable where death was caused by peritonitis resulting from the regular movements of a bicycle.⁷⁵ Accident, for this purpose, may be the result of the intentional act of another. For example, take the case of lynching already mentioned in this section.

External and violent means. The accident insur-

⁷¹ Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206.

⁷² Nax v. Travelers' Ins. Co., 130 Fed. 985.

⁷³ Carnes v. Iowa, etc., Assn., 106 Iowa 281, 76 N. W. 683.

⁷⁴ Smouse v. Iowa, etc., Assn., 118 Iowa 436, 92 N. W. 53.

⁷⁵ Appel v. Aetna Ins. Co., 83 N. Y. Supp. 238, 180 N. Y. 514.

ance companies have stipulated that the accident must be the result of external and violent means. These words, as construed by the courts, mean merely that some cause of the injury must have existed outside of the body of the insured and must have produced injury. Death from inhalation of gas is an accident resulting from external and violent means for this purpose.⁷⁶

Accident as the cause of injury. An accident must be the cause of the injury to warrant recovery. In many cases an accident follows illness, or illness follows an accident in such a manner as to show causal connection. Other combinations may be suggested; for example, disease, apparent recovery, then accident which would otherwise be harmless but becomes serious because it brings back the old disease. The policy frequently provides that the injury must result from accident, "independently of all other causes." In the leading English decision on this question⁷⁷ the insured, while at a railway station, was seized with a fit and fell off the platform. Then a train which was passing ran over him. This was held to be an accident, not a mere consequence of the disease which induced the fit.

101. Visible mark of injury.—The requirement that there must be a visible mark of injury has accomplished virtually nothing in restricting the insurer's liability. The decisions lead us to the conclusion that "visible" here means merely capable of being determined, not merely by sight, but by any

⁷⁶ Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347.

⁷⁷ Lawrence v. Accidental Ins. Co., 7 Q. B. D. 216 (Eng.).

the human senses. Thus, where the only mark of phyxiation was the emanation of illuminating gas from the body when artificial respiration was produced, this was held to be both an external and visible mark of injury.⁷⁸ The mark may be hidden under the surface of the body. It is sufficient if it become visible when the body is dissected. For example, the discoloration of a part of the brain is sufficient, though brought to light only by an autopsy.⁷⁹

102. Excepted risks.—One common form of accident policy provides as follows: “This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleep-walking; medical or surgical treatment except amputations necessitated solely by injuries and made within ninety days after accident; intoxication or narcotics; voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor; sunstroke or freezing; dueling or fighting, war or riot; intentional injuries (inflicted by the insured or any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expedi-

⁷⁸ *Menneilley v. Employers' Liability Assur. Assn.*, 148 N. Y. 596, 31 R. A. 686.

⁷⁹ *Union Casualty & Surety Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677.

tions into wild or uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable cars), riding in or on any such conveyances not provided for transportation of passengers, walking or being on a railway bridge or roadbed (railway employees excepted).”

103. Same subject—Accident while intoxicated.—Under the express provisions of many accident policies, no recovery is allowed by reason of accidents occurring while the insured is intoxicated. The company need not show that the intoxication caused the accident. Proof of the coexistence of the two is sufficient to prevent recovery. Thus, where the insured, while intoxicated, allowed a friend to shoot through the insured’s ear and was killed in the attempt, no recovery was allowed.⁸⁰ Probably, under this clause, no recovery would be allowed if plastering fell off a ceiling and hit the insured while in bed and asleep soon after an over-indulgence.

104. Same subject—Injury from poison.—Accident companies frequently stipulated against liability for injury resulting from “taking poison.” This was generally held to refer only to an intentional and conscious taking of poison, not to the taking of poison by mistake, nor to an unconscious absorption of poison into the system. Therefore, the companies extended the exemption to “poison in any way taken.” The courts then held that this referred, for example, to the liquid or powdered state of the poison, not to the intention or consciousness of the

⁸⁰ *Shader v. Railway Pass. Assur. Co.*, 66 N. Y. 441, 23 Am. Rep. 65.

insured at the time of the poisoning.⁸¹ Hence, the companies gained little or nothing by the addition of these words. However, a clause now frequently used relieves the company from liability for the "voluntary or involuntary taking of poison or contact with poisonous substances." This provision and similar ones seem to have accomplished the purpose of the insurers.⁸²

105. **Same subject—Inhalation of gas.**—Many accident companies have sought to escape liability for death caused by inhalation of gas. The courts have been inclined to construe such exceptions as referring only to intentional inhalations of gas, as, in the dentist's chair, or preliminary to a surgical operation. An Illinois case has come close to outdistancing others in allowing recovery.⁸³ The policy in question contained a stipulation against liability for "death * * * resulting, wholly or partly, directly or indirectly * * * from any gas or vapor." The insured was killed by the accidental inhalation of gas while asleep. The insurer was held liable in view of the state of the authorities and the strict construction which, the court held, must be given to such provisions.

106. **Same subject—Intentional injuries.**—Many policies provide against liability for "intentional injuries inflicted by the insured or any other person." This exception has been construed by the courts in accordance with its obvious purpose. A comparison between the principles which are applicable in this

⁸¹ *Metropolitan, etc., Assn. v. Froiland*, 161 Ill. 30, 52 Am. St. Rep. 359.

⁸² *Maryland Casualty Co. v. Hudgins*, 97 Tex. 124, 64 L. R. A. 349.

⁸³ *Travelers' Ins. Co. v. Ayers*, 217 Ill. 390, 75 N. E. 506.

connection and in criminal law is of interest. If one, with deliberation and premeditation, shoots at X intending to kill him, but, through poor aiming, kills Y instead, he is guilty of murder "in the first degree"; that is, for our purpose, deliberate murder. But Y's estate would probably be allowed to recover accident insurance, even though this clause excepting intentional injuries is inserted in the policy.⁸⁴

107. **Total disability or loss of a member.**—We have already considered total losses in fire and marine insurance. The question does not arise in life insurance, but appears in this form in accident insurance: When is one totally disabled? The answer depends to some extent upon the clause in the policy. Certain policies stipulate that total disability arises only when the insured is incapable of engaging in "any and every kind of business pertaining to his occupation."

The general rule on this question may remind the student of agency of the obligation of the wrongfully discharged agent to seek other and similar employment, though not all kinds of work. In a leading case⁸⁵ the plaintiff was a "billiard-saloon keeper." He admitted that, after the accident, he could still do certain acts necessary in his business, but introduced evidence to prove that he was wholly disabled from doing many of the material acts necessary. Recovery as for a total disability was allowed. The court suggested the following analogy: "Suppose a barber who can use his razor and shears in his right

⁸⁴ *Richards v. Ins. Co.*, 89 Cal. 170, 23 Am. St. 455.

⁸⁵ *Young v. Travelers' Ins. Co.*, 80 Me. 244, 13 Atl. 896.

and only, but can use his left to wipe his customer's face, comb and dress his hair, and receive pay and make change, by an accident is wholly deprived of the use of his right hand, so that he can neither shave his customer nor cut his hair, can it be said that he is not wholly disabled from the prosecution of his business as a barber? An accident policy which would not afford indemnity in such a case would be delusion and a snare."

Loss of a member. A member of one's body may be lost for the purpose of recovering accident insurance, though it is not severed from the body. For example, a ball from a pistol hit the insured in the back and caused the entire destruction of the use of both feet by paralysis. He was allowed to recover for the loss of "two entire feet."⁸⁶

⁸⁶ Sheanon v. Pacific, etc., Ins. Co., 77 Wis. 618, 9 L. R. A. 685.

CHAPTER XIII.

GUARANTY AND LIABILITY INSURANCE.

108. **Guaranty insurance.**—The close connection between the law of suretyship and the law of insurance is plainly in evidence in the rise of many forms of guaranty insurance corporations which are taking over, gradually, the duties of suretyship formerly shouldered by friends and relatives, and private individuals who made a business of acting as sureties. The term “guaranty insurance” is applied to guaranties of real estate titles, or title insurance, credit insurance, and, in particular, to fidelity insurance, which is designed to protect employers against the defaults of their employees.

Guaranty insurance is governed generally by the rules of suretyship, many of which have been established for centuries. However, the maxim of suretyship that the surety is a favorite of the law and is to be favored in cases of doubtful construction is not applied in favor of guaranty insurers. The rule of insurance, that the contract must be construed strictly against the insurer because drawn by him, is adopted.⁸⁷

109. **Liability insurance.**—Many forms of liability insurance have appeared in recent years. Such insurance is designed to indemnify the insured

⁸⁷ Amer. Surety Co. v. Pauly, 170 U. S. 133, 144.

against all losses sustained by him through legal proceedings growing out of personal injuries received by the insured's employees and third parties. One of the most important forms is employers' liability insurance, which covers not only the actual damages assessed, but incidental costs and attorney's fees which would otherwise fall on the insured in actions by injured employees. Generally the insured is required to give immediate notice to the insurer when sued by the injured person. The insurer then steps in and takes full charge of the defense.

In determining the rights of the injured person directly or indirectly against the insurer, two forms of contracts should be distinguished. Conceivably, a policy might be so worded as to make the injured person a beneficiary thereunder with a right to sue the insurer directly. However, such cases have arisen but rarely. Generally, the injured person has no rights whatsoever against the insurer except as a general creditor of the insured. Whether or not the insurer has settled with the insured is no concern of the person injured.⁸⁸

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⁸⁸ *Embler v. Hartford, etc., Ins. Co.*, 158 N. Y. 431, 44 L. R. A. 512.

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QUIZ QUESTIONS

INSURANCE

(The numbers refer to the numbered sections in the text.)

1. (a) Is insurance a good thing for everybody? (b) Would you advise a bachelor, with no one dependent upon him, to insure his life? (c) Does a man who fails to die during the five years for which his life is insured receive back anything, tangible or intangible?
2. (a) Why should uneducated people have objected to fire and life insurance? (b) Are life insurance agents useful members of society?
3. (a) What resemblance exists between lotteries and life insurance? (b) Is fire insurance worth as much as it costs?
4. Why do we spend so much time on "agency" in law school today, while Blackstone knew apparently almost nothing on the subject?
5. Would it be advisable to provide, by statute, that, in actions against insurance companies on policies issued by them, the defendant shall not be permitted to set up want of insurable interest as a defense, if it accepted the premiums paid without objection on this ground?
6. (a) One who has a legal or equitable interest in property always has an insurable interest therein. Is it equally true that if he has an insurable interest in the property he has a legal or equitable interest therein? (b) Should a man be permitted to insure his old homestead to the amount of its value to him or only to the amount of its market value?
7. If the state of X requires an insurable interest in property to exist when the insurance is effected, and the state of Y requires such interest only when the loss occurs, and the state of Z requires an interest at both times, which of the

three states would be least troubled by arson, if other conditions are equal? Would there be more arson in Y than in Z?

8. (a) Should the owner of a railroad be permitted to insure the life of a faithful locomotive engineer? (b) Should a widower be permitted to insure the life of his deceased wife's sister who keeps house for him but whom he can not marry under the law of the jurisdiction in which he lives? (c) X has broken his promise to marry Y. Can Y now insure his, X's, life?
9. (a) If a beneficiary is permitted to continue to hold life insurance upon the life of one in whose life such beneficiary has ceased to have an insurable interest, is there not danger of murder? (b) What reason can be given for allowing the beneficiary to retain such insurance?
10. What is the difference, in legal effect, between warranting a horse sound in a contract of sale, and a building fireproof in an insurance contract?
11. A, in applying for life insurance, conceals the fact that he is about to become a bankrupt. Can the company avoid the policy on this ground?
12. How can you prove that a man misrepresented his opinion as to the state of his health?
13. Why should an insurance company desire to make all representations warranties?
- 10-13. Make a chart showing the effect of good faith and materiality in cases of concealment, representation, and warranty, thus:

	GOOD FAITH.	MATERIALITY.
	Is the good faith of the insured an issue?	Is the fact that the matter is immaterial an issue?
Concealment		
Representation		
Warranty		

- 14-15. (a) What is the reason for the existence of the doctrine of subrogation? (b) Would fires be of more frequent occurrence if this doctrine did not exist?
16. If the contract of insurance expressly provides that the right of subrogation shall not exist, would it exist nevertheless?
17. Aeroplanes A and B collide in the air. Both are damaged. A is insured. A's insurer pays for the loss in full. Has the insurer any means of obtaining reimbursement?
18. A builds a house worth \$3,000 for that amount. He pays an additional \$100 to the Asbestos Shingle Company which roofs the house and agrees, in consideration of the extra hundred, to rebuild the house if sparks fall on the roof and cause the house to burn within the next ten years. The house was insured for \$2,500. Discuss the rights of the insurer against the shingle company in case of fire.
19. A fire insurance company, merely as a matter of advertisement, rebuilds a house negligently destroyed by fire by a railroad. Discuss the right of subrogation here.
20. Have you ever heard of an express company insuring a package? In such a case, is it an insurer?
21. (a) When is the owner of a \$3,000 house insured for \$2,000 fully indemnified for its total destruction? (b) Is there such a thing as subrogation pro tanto?
22. Is a person who ships goods and agrees that the carrier shall have the benefit of any insurance guilty of concealment if he later insures the goods and does not disclose this portion of his agreement with the carrier to the insurer?
23. Under a valued policy law, an insurer is compelled to pay the insured \$3,000 for the loss of a \$2,500 house. How much may the insurer recover from the tort-feasor who caused the loss?
24. X negligently kills a horse insured against death by C. If C replaces the horse, may he claim subrogation to the insured's rights against X?
25. X negligently breaks F's nose. F collects from an accident insurance company. May the company then collect from X?

27. (a) Is one estopped from asserting a right which he has waived? (b) Does one always waive a right which he is estopped from asserting? (c) State the elements of estoppel, and also the elements of waiver.
28. Is the parol evidence rule followed in courts of equity?
- 29-31. The policy provides that, owing to the impossibility of freeing a place once used for a match-factory from particles likely to take fire spontaneously, if the property in question has been used as a match-factory before the policy is delivered, is then, or is in the future used for this purpose, the policy shall be void. At the time the policy is delivered the insured informs the agent that the building has been used for that purpose and that, though it is not so used at present, it is again going to be used for this purpose within the next 50 days. The agent replied, "These facts cut no figure." What part, if any, of this conversation may be shown in an action at law on the policy?
32. What would be the effect of a clause in the policy by the terms of which the insured agrees that the insurer need not send notice of the maturity of premiums as required by statute?
33. To what extent are incontestable policies contestable?
35. What objections may be urged to the assignment of a fire insurance policy though not to the assignment of a promissory note?
36. Is it more important to prevent arson than murder? Are there any cases in which life and not fire insurance may be assigned?
38. Is it not a case of over-insurance if a life tenant insures property for its full value?
39. What is the extent of the insurable interest of a mortgagee in the property mortgaged? Has he an insurable interest if the land mortgaged without the house on it is more than sufficient to pay the mortgage?
40. Has the beneficiary in life insurance any rights against the insured?
41. Why should the insured ever desire to have the beneficiary unconditionally designated as such?
42. (a) Are not the rights of a beneficiary always subject to

the condition that the premiums must be paid? (b) What other conditions may be attached to the beneficiary's right, and with what effect?

(a) If A gives B a horse on condition that A is to have it back, on demand, what is the nature of B's rights until the demand is made? (b) Compare this with the situation arising when A takes out insurance in B's favor, but reserves the right to change the beneficiary.

What must be surrendered to obtain the surrender value of a life insurance policy? Who must do the surrendering?

May a creditor of the insured institute garnishment proceedings against the company in which the debtor has taken out fire insurance, and, if so, under what circumstances?

What effect has the existence of a surrender value upon the rights of the creditor of the beneficiary in a life insurance contract?

In so far as the rights of creditors are concerned, what is the difference between the right of the insured to transfer to his wife his life insurance, and his right to transfer a calico dress or a diamond necklace to the same person?

Point out any differences between the extent of a creditor's insurable interest in the life of his debtor and his right to recover under such a policy.

Why should life insurance and not funds in a savings bank be exempt from the claims of creditors?

If a number of companies agree upon a certain form of policy, have we a standard form of policy?

Distinguish void and voidable.

Compare the terms: location and residence. Where does a man reside if his home is in X and he is on a visit to Y?

Determine, by examining a statute book, or a work on procedure, when a civil action is deemed commenced.

Distinguish: other insurance; over-insurance; co-insurance.

If the insured discards rubber boots and commences to wear shoes with metal tacks in the soles, has he increased the risk of loss to his flour mill? Assume that it is a gunpowder factory instead of a flour mill.

60. (a) What is the difference between vacating a vault in a cemetery and a residence? (b) May one person occupy two residences at the same time?
61. Does fire exist when an electric arc light is in use?
62. Can a hostile fire exist in a stove? In a pipe intended for smoking?
63. May the insured recover from a fire insurance company for the loss of the insured's spectacles and overcoat while assisting in putting out a fire in his residence?
65. May sabotage be war or riot?
66. In putting out a fire, the water pressure is so strong that the stream from the firemen's hose demolishes the building. Is the fire insurance company liable?
67. What is the proximate cause of loss by theft during a fire?
68. Is not contributory negligence always a defense in a civil action?
69. (a) Can steam explode? (b) Is the fire insurance company liable for a fire caused by explosion, or an explosion caused by fire?
70. Lightning strikes a tree and causes the tree to fall over and cave in a house, which takes fire at once and is completely consumed. Discuss the fire insurance company's liability.
71. If part of a building falls and then the building burns, though not as an effect of the falling, for what amount, if any, is the insurance company liable?
72. May a fire insurance company cancel a policy because of personal enmity between the president of the company and the insured? Or for the sake of oppressing the insured?
73. What is the difference between the cash value of property, its market value and its value to the owner?
74. How may a man make a legitimate profit from a fire insurance company when it fails to exercise the option to rebuild?
75. Can you frame a valued policy law applicable in case of partial loss?
76. Distinguish notice of loss from proofs of loss.
77. Who are magistrates?

78. Compare the provision in regard to the time when an action must be commenced on a fire insurance policy with the question which arises in constitutional law when the legislature cuts down the time within which an action on an existing contract may be brought.
79. Do you ever hear of a life insurance company in the name of which the word "mutual" appears? "Mixed" or "stock"? Explain these terms.
80. Distinguish mutual and mutual benefit companies.
- 81-82. Distinguish premiums and assessments.
83. Distinguish cash loan and surrender values. Why should an insured person surrender his policy if both sums are the same in amount?
84. If the insured suddenly becomes insane on his way to the insurer's office intending to pay his premium, is non-payment excused?
85. Is it true, in the law of contracts, that the creditor must always give the debtor notice of the amount due before suing for breach of contract, where the determination of the amount is peculiarly within the knowledge of the creditor?
86. Why is it more fraudulent to insure one's life with the present intention of committing suicide than to take out the insurance in good faith and form the intention thereafter?
87. (a) Can an insane man commit suicide? (b) If one kills himself by drinking carbolic acid for coffee, has he committed self-destruction?
88. How insane must a man become to make himself incapable of committing suicide?
89. Did John Brown die at the hands of justice? Nathan Hale? Jesse James? One shot in lawful self-defense?
90. (a) Does death ever result from a violation of law, except in cases of capital punishment? (b) Is it the act or the violation of law which causes death when one is killed in the act of burglary by the resident of the house entered?
92. Does a fire insurance policy cover losses due to the hostile acts of man? What is the rule in marine insurance?

93. Can you see any connection between England's tariff for revenue policy and her rule in regard to illegal ventures?
94. What reason for the rule in reference to general average loss can be suggested?
95. Why should the doctrine of constructive total loss exist in marine but not in fire insurance?
96. By abandonment do we mean that the ship may be allowed to drift and be utterly deserted in mid-ocean?
97. In fire insurance, if the company exercises its option to rebuild, is any allowance made by reason of the fact that the insured gets a new house in place of what may have been an old one? Compare the rule in marine insurance.
98. Explain the labor clause in marine insurance.
100. Is it an accident to choke on too large a bite of beefsteak?
101. Is there a visible mark of injury if one is scared to death?
103. When is a person intoxicated?
104. What is poison?
105. Can we inhale anything else than gas? Are we inhaling gas all the time, when not exhaling?
106. Is one who allows himself to be tattooed submitting to intentional injury?
107. If one loses his reason in an accident is he necessarily totally disabled?
108. Why is a surety a favorite of the law? Why not a guaranty insurance corporation?
109. Does employers' liability insurance encourage carelessness on the part of employers?

PART III

EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION

BY

WARREN H. PILLSBURY, B.L., J.D.*

CHAPTER I.

THE LAW OF EMPLOYERS' LIABILITY.

1. **Scope of article.**—The general subject of Principal and Agent has been discussed elsewhere.¹ This subject is nearly, though not entirely, synonymous with that of Master and Servant, the former referring more particularly to rights and duties arising from one person empowering another to make contracts for him, while the latter refers more to the hiring by one person of another to perform labor or service. The phrase *employer and employee* is a more apt term for the latter relationship in the light of modern industrial development. All three subjects are governed, in the main, by the same principles.

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¹ See Vol. 2, subject, AGENCY.

The purpose here is to discuss in detail the obligations and defenses of the employer in respect to injuries sustained by his employees in the course of their work, including his three common law defenses of Assumption of Risk, Fellow-Servant, and Contributory Negligence. The recent statutory reform movement, substituting a new system of rights and duties of the employer, based upon the insurance principle and social justice, will be discussed in the following chapter.

2. Employer's liability for injury to employee—General rule.—The liability of the employer to third parties for torts committed by his employees, is governed by the maxim, *respondeat superior*, which means, let the principal respond in damages for the wrongful acts of his subordinates. This responsibility is often vicarious, as the employer may not have intended, and may even have forbidden, the wrongful act of his employee. Such responsibility is justified upon the theory that the principal has set in motion, and is continuing to carry on, a business which will incidentally cause loss to third parties in the course of its operation. The business, and necessarily its proprietor, should therefore pay for all damage unlawfully caused, as part of its cost of operation, even though the proprietor be free from personal participation in the wrongful act.

With respect to the liability of the employer for injuries sustained by his employees in the course of his business, the law employs a different theory. The employer and employee are deemed joint adventurers in a common enterprise, each assuming the risk of

injury in the course of the business.² The employer must, it is true, provide a reasonably safe place in which to work, and reasonably safe working companions. He must also use, in his personal acts about the business, the same care with respect to the safety of his employees which the average reasonable and prudent man would exercise under like circumstances. Having done so, his duty is at an end. For injuries not caused by his fault, but due to pure accident, acts of third parties or Act of God, he is not liable, even though they occur naturally in the course of the business. In short, he is held only for injuries caused by his fault.

Where an employee is injured while acting within the course and scope of his employment, under circumstances which, if he were a stranger similarly injured would entitle him to damages from the employer, the latter may successfully defend himself by invoking any of the three common law defenses previously mentioned which may be applicable.

3. First defense of employer—Assumption of risk doctrine.—The first of these defenses is called the Assumption of Risk doctrine. This is to the effect that an employee impliedly assumes in his contract of employment all ordinary and obvious risks incidental to the employment, except those arising from want of care or breach of duty of the employer himself.³ While the basis of this rule is usually placed upon an implied provision of the contract of hire, it is obvious that the rule cannot be explained

² 20 Harvard Law Review 31.

³ *Cripsin v. Babbitt*, 81 N. Y. 516.

upon any contractual theory, as the employer and employee almost never have an understanding upon this point. It is instead a rule of positive law, grafted into the terms of the contract by a legal fiction, and founded upon a supposed rule of public policy that the best way to protect employees against injury and employers against excessive damage suits, is to make the former bear the consequences of all injuries which they could reasonably foresee. Probably it is to a large extent also based upon the legal maxim, *volenti non fit injuria*, which means that one who has voluntarily encountered a known danger cannot recover from the creator thereof.⁴ Illustrations of the assumption of risk doctrine are given below.⁵

⁴ F. H. Bohlen in 20 Harvard Law Review 14.

⁵ Examples of risks assumed by a servant are given in the following extract from Cooley, Torts (2d ed.), p. 1051: "Trainmen take the risk of a low bridge over the track, and of post, poles or other structures or obstructions near thereto, if they know, or by the exercise of ordinary care might know, of their existence. 40 N. J. L. 23; 52 Ia. 276; 125 Mass. 79; 104 Ind. 88; 196 U. S. 51. But other cases hold that a servant does not assume the risk of obstructions near the track unless he knows not only of their existence in a general way, but also of their dangerous proximity to the track. 214 Ill. 124; 124 Ia. 48; 98 Me. 61; 23 Ore. 94; 71 Tex. 700. A railroad servant assumes the risk of unblocked guard rails or frogs. 49 Mich. 466; 36 Kan. 129; 147 Mass. 604. So of an unguarded ash pit, of which he has knowledge. 111 Ky. 822; 27 S. C. 71. So of a car loaded with projecting rails or logs, 101 Pa. St. 1; of handling disabled cars being taken to the repair shop, 32 Minn. 54; 110 Ind. 18; of cars with double deadwoods, and generally of defective appliances of which he is aware. 147 U. S. 238; 119 Pa. St. 301; 107 Mich. 540. So of smoke and gases in a tunnel. 75 Md. 152. One employed to shovel snow from the tracks at a distance from any dwelling takes the risk of injury from frost while so employed. 23 R. I. 583. Trainmen do not take the risk of an unsafe track. 67 N. J. L. 636; 123 N. C. 280; 135 Mich. 95. One employed about a mill or factory assumes the risk of unguarded machinery with which he is familiar, or which is patent to ordinary observation. 35 Kan. 292; 135 Mass. 398; 66 Mich. 277; 71 Mo. 66. So of the danger of falling

4. **Second defense of employer—Fellow-servant doctrine.**—This defense grows out of the preceding one. It is usually stated that when the servant enters the employment of a master, he assumes the risks incident to the employment, and that among those risks are injuries caused by the negligence of fellow workmen.⁶

The fellow-servant rule originated in the United States in 1841, in the case of *Murray v. South Carolina Railroad Company*.⁷ The doctrine is not, as frequently stated by the courts, an implied provision of a contract of hire, but is instead a positive rule of law, and it is based upon an assumed public policy and expediency.⁸ Many arguments have been advanced by the courts in favor of the rule, but all are specious, and the doctrine has now been abolished by statute in more than two-thirds of the states.⁹ Probably the underlying reason for its development by the courts is that American economic and legal

earth in excavating, or of falling rock in a quarry. 53 Wis. 661; 53 Kan. 731. A servant whose duty it is to repair electrical lines takes the risk of defective poles and crossarms, of defective insulation of the wires, or of defective insulation of the wires of another company in dangerous proximity to the line he is repairing. 97 Md. 620; 126 Ia. 241; 107 Tenn. 392; 176 Mass. 125. So one employed to take down decayed and unsafe poles takes the risk of their falling. 74 Minn. 163. As a general rule, a servant cannot recover for any injury caused by the very defect which he is employed to repair. 74 Minn. 163. An employee in a store takes the risk of slipperiness of marble stairs with which she is familiar. 178 N. Y. 377. Where the master keeps a dangerous dog and the servant knows of his vicious propensity, he takes the risk if he continues in the service. 78 Hun. 560 (N. Y.). A servant employed in a white lead factory assumes the risk of injury from the lead. 30 App. Div. 205; 51 N. Y. Supp. 602."

⁶ *Murch v. Wilson*, 168 Mass. 408, 47 N. E. 111.

⁷ *McMullan's Law*, 385 (S. C.).

⁸ *Farwell v. Boston, etc., R. R. Corp.*, 4 Metc. (Mass.) 49.

⁹ *Infra*, sec. 17-19.

thought during the most of the last century was strongly individualistic in trend. The age was one of pioneering, and it was the policy of the law to encourage the untrammelled development of industry, and to make every person, employer or employee, the guardian of his own safety.

5. **Who are fellow-servants.**—No clear and specific definition that will cover all cases can be given of a fellow-servant. Thompson on Negligence gives as the general rule upheld by the weight of adjudicated cases, “that all who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who, under the rule under consideration, are deemed to take the risk of each other’s negligence.”¹⁰

The servant injured and the one at fault must be engaged in the *same service*, i. e., service of such nature that other employees, in the exercise of ordinary sagacity, ought to foresee, when accepting employment, that the negligence of one would probably expose them to injury. For illustration of the rule, see the cases cited in the note.¹¹ Special applica-

¹⁰ See also *Mast v. Kern*, 34 Ore. 247. *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521.

¹¹ The following have been held to be fellow-servants: The assistant foreman of a cotton mill machine shop and the foreman of its slashing room; a foreman in charge of a gang of men, under the supervision of a general superintendent, and the men under him; but not so as to a foreman having entire charge of the work or plant, or a foreman discharging a positive duty owing by the master. *Cooley, Torts* (2d ed.), pp. 1083-84. In the following cases the employees are not fellow-servants: A sawyer

tions of the rule have been developed for railroad employees.¹² The definition of fellow-servants is a

having charge of saw and machinery for handling logs, and the men working with him; one engaged to repair a mill and those working in the mill; the gas inspector or tester of a mine and the miners; one who inspects rafted logs for pikes and those who put the logs on the carriage to be sawed. *Evans v. Louisiana Lumber Co.*, 111 La. 534.

All employees of the same master engaged in erecting a building, though doing different lines of work, as carpentry, masonry, etc., have been held to be fellow-servants; all the persons composing a ship's company, divided into three classes: (1) the deck department, including officers, sailors, etc.; (2) the engineer's department, and (3) the steward's department, such division being merely a matter of convenience, are fellow-servants. But an employee on a lighter is not a fellow-servant of a seaman on a vessel employing the lighter. In general, all who are employed by the same master on any particular work, although there may be different ranks or different lines of work, or divisions into different gangs, are considered fellow-servants. But workmen of different contractors, or masters who are working on the same building or job, or otherwise for the same proprietor on the same premises, are not fellow-servants. *Morgan v. Smith*, 159 Mass. 570; *Moll, Independent Contractors*, Sec. 196. Whether elevator operators are fellow-servants with others in the same building is disputed. See note to *Judd v. Letts*, 158 Cal. 359, in 41 L. R. A. (N. S.) 156.

¹² Beginning with *Chicago, etc., Railway Company v. Ross* (112 U. S. 377, modified in *New England R. Co. v. Conroy*, 175 U. S. 323) the United States Supreme Court decided that a railway train conductor was a vice-principal representing the company and not a fellow-servant with the same train's engineer. This decision has since been modified by the same court holding them fellow-servants. Many state courts, following the earlier decision, hold that the conductor is not a fellow-servant of the other employees on the train, and allow the latter to recover for the former's negligence, against the common master. But the better rule is that the conductor is a fellow-servant with the other employees on the same train, and that all such employees are fellow-servants with respect to each other, while engaged in the operation and handling of the train; thus, engineer and brakeman; engineer and fireman; brakeman and fireman; engineer, fireman, brakeman and shovelers; and two engineers of two engines attached to the same train; and the employees on different trains operated by the same company, are held to be fellow-servants. *Meyer v. Illinois, etc., R.*, 177 Ill. 591; *Oakes v. Mase*, 165 U. S. 363. So, also, those who load cars and whose duty it is to see that they are properly loaded, and those who move them. It is now generally held that a railway employee assumes the risk of negligence in any department and that the whole business of the railroad must be regarded as a single enterprise. *Northern Pacific R. v. Hambly*, 154 U. S. 349.

question of law for the court; whether a given case falls within that definition is a question of fact, to be determined by the jury under proper instructions.¹³

6. Exceptions to fellow-servant rule—Superior service.—To mitigate the hardships of the fellow-servant rule, different courts have from time to time enunciated exceptions to it. Some of these exceptions have been recognized in only a few jurisdictions, and eventually repudiated by the weight of authority.

One of the attempted exceptions is the *superior servant* rule, sometimes known as the Ohio rule.¹⁴ It is here held that the fellow-servant rule does not apply where the injury is due to the negligence of another servant who is entrusted with duties of a higher grade. By a "superior servant" is meant one who is entrusted with authority or the power

A baggageman and an engineer; Pullman porter, conductor and engineer; and the train crew and those who repair and inspect the cars and engines; a train dispatcher and those on the train whose movements he governs, are not fellow-servants. *Marsh v. Lehigh, etc., R.*, 206 Pa. St. 558; *Hankins v. Railroad Co.*, 142 N. Y. 416. Where one railway company runs its cars over the tracks of another, the latter's employees are not fellow-servants of the former's employees.

A conflict of authority exists as to whether or not a station agent or local telegraph operator and those in the train service; a section foreman and the men under him; trainmen and track repairers, are, respectively, fellow-servants. *Northern Pacific R. v. Dixon*, 194 U. S. 338; *Justice v. Pennsylvania Co.*, 130 Ind. 321. A "student" or "cub" brakeman and a freight train crew are considered fellow-servants. *Louisville, etc., R. v. Vincent*, 116 Tenn. 317. A third person concurring with a fellow-servant in injuring plaintiff cannot invoke the fellow-servant doctrine as a defense. *Kentucky, etc., R. v. Sydnor*, 119 Ky. 18.

¹³ *Chicago, etc., R. R. v. Swan*, 176 Ill. 424; *Lake Erie, etc., R. R. v. Middleton*, 142 Ill. 550.

¹⁴ *Little Miami, etc., R. v. Stevens*, 20 Ohio 415. But see *Walker v. Gillet*, 59 Kan. 214; *Chicago, etc., R. R. v. Ross*, 112 U. S. 377; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70.

of supervision over the injured employee. Power to hire and discharge is sometimes, but not necessarily, a test of superior service.¹⁵

The "superior servant" exception has not been recognized by the weight of authority,¹⁶ and properly so, as the negligence of foremen, superintendents, and others in authority is as much to be anticipated as a risk of the employment in entering upon it, as the negligence of a fellow-servant of the same rank. The public policy, if any, which supports the fellow-servant rule, also applies equally to higher employees engaged in the same work.

7. Same—Different departments.—Another exception obtains in Illinois, Kansas, Texas, and a few other states, to the effect that the general rule does not apply where the negligent servant was employed in a different branch or department of the work.¹⁷ For example, where a railroad track laborer is injured by the negligence of an engine driver, or a carpenter employed upon railroad buildings is injured by a yardmaster's negligence in making up trains. This exception is also unsound, as the basis of the fellow-servant rule is the existence of known risks of the employment, however caused, among which are the negligence of any fellow-servant which may be anticipated at the time of entering the employment.

¹⁵ Compare *Nix v. Texas, etc., R.*, 82 Tex. 473, and *Noyes v. Wood*, 102 Cal. 389.

¹⁶ *Vogel v. American Bridge Co.*, 180 N. Y. 373; *Sale Creek, etc., Co. v. Preddy*, 117 Tenn. 168 (statutory); *Cooley, Torts* (students' ed.), pp. 544-545; *Crispin v. Babbitt*, 81 N. Y. 516.

¹⁷ 193 Ill. 172.

The exception has not been followed in other jurisdictions.

Necessarily, however, the servant assumes only the hazard of his own employment, and is not barred from recourse against the employer where his injury is due to the negligence of another servant of the same employer engaged in another and wholly distinct business, as by a member of the crew of a different vessel owned by the same owner, or of another department of the same service that is so far separated as to exclude probable contact and resultant danger.

8. Same—Non-assignable duties of employer—Vice-principal doctrine.—The limitation of the fellow-servant rule which has found most favor with the courts is that here discussed. It is supported by the weight of authority and is sound in principle. This exception, briefly stated, is that there are certain duties which an employer personally owes to his employees, and these cannot be assigned to others to be carried out in such manner as to free the employer from liability if they be not satisfactorily performed.¹⁸ Any employee of whatever rank or station, to whom the employer may delegate the fulfillment of these duties, is called a vice-principal. It may happen that an employee of lower grade is charged with the performance of a non-assignable duty of the employer, affecting the safety of those above him in rank or position. The test of vice-principalship is the character of the negligent act

¹⁸ *Hough v. Ry. Co.*, 100 U. S. 213; *Mullin v. Calif., etc., Co.*, 105 Cal. 77.

or omission, not the rank or grade of the negligent employee.¹⁹

9. **Same—What are non-assignable duties.**—The duties which an employer cannot delegate to his subordinates so as to free himself from liability for their violation may be listed as follows:

(1) *To make suitable rules and regulations.* It is the master's duty to establish and promulgate general rules for the government of the service. For example, a railroad company must provide rules and regulations for the running of its trains. Some businesses, being simple and having few employees and little machinery, need few regulations. Wherever adequate regulations will serve to reduce the dangers of the business, the duty exists to provide suitable rules.

The scope of this duty is stated as follows: "The duty of the master in making rules is measured by the law of ordinary diligence. The law varies with the situation, for what would be ordinary diligence under one set of facts would be negligence under another. If, however, under the circumstances of a particular case, the master has met the obligation of ordinary diligence in making and enforcing a rule, he is free from liability, even if some other rule would have been safer and better."²⁰

(2) *To provide a safe place for work.* A master is bound to provide a reasonably safe place where the servant may perform his work. "It is the master's

¹⁹ Northern Pacific R. v. Peterson, 162 U. S. 346; Mast v. Kern, 34 Ore. 247.

²⁰ Devoe v. N. Y., etc., Ry., 174 N. Y. 1.

duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment; and, further, to exercise reasonable care, by means of inspection and repairs, when needed, to keep the plant and appliances reasonably safe.²¹

(3) *To provide safe tools and appliances.* The duty in respect to tools and appliances is substantially the same as the duty with respect to a safe place for work. In fact, some courts use the term "appliances" to include the place where the work is being done, as well as the equipment. After a master has supplied a safe place for work and suitable appliances, he is ordinarily not liable, however, for injuries caused by their becoming unsafe by reason of the negligence of the servants using them, these being the acts of fellow-servants. For example, if the master supplies a safe engine, but the engineer in charge fails to put water in the boiler, whereby it explodes and injures a fellow-servant, the master is not liable; or, if the master supplies suitable ropes for a derrick and extra ropes for replacement as they wear out, and the servant fails to put in new ropes when needed, the master is not liable to a fellow-servant for an injury sustained by such omission.

In *Jaques v. Great Falls Mfg. Co.*²² the court said: "In many kinds of service the care and keeping of

²¹ *Smith v. Erie Ry. Co.*, 67 N. J. L. 636. *Simone v. Kirk*, 173 N. Y. 7; *Contra, O'Connor v. Rich*, 164 Mass. 560.

²² 66 N. H. 482.

tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the employer's duty is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making repairs may be entrusted to servants, and any neglect in the performance of this service is the negligence of a servant. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition of safety, beyond what is needed in operating it, it is the employer's duty to supply the necessary intelligence, skill and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable."

If one servant is injured by reason of an improper use by his fellow-servant of a proper machine or appliance, he cannot recover against the master. Where a servant patched up a ladder in a negligent way, whereby another servant was injured, the master was held not liable.²³

(4) *To provide suitable fellow-servants.* The master owes a duty to each of his servants to exercise due care in providing a sufficient number of suitable, efficient and safe fellow-servants. The master's duty "to provide reasonably safe instrumentalities embraces the obligation to provide a sufficient number of servants to perform the work safely; proper

²³ *Higgins v. Higgins*, 188 Mass. 113.

and sufficient help and assistance are as essential in the performance of the servant's duty, where not safely performed alone, as safe instrumentalities, and the law enjoins upon the master the duty of providing them."²⁴

The duty to provide suitable fellow-servants requires care proportionate to the danger that would result from the employment of incompetent or unskillful employees. And it cannot be avoided by assignment, nor excused by ignorance.²⁵ "Where the service in which the servant is employed is such as to endanger the life and persons of co-employees, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill and habits of life" for the protection of such co-employees.²⁶

If due diligence has been used in selecting a servant, subsequent facts disclosing unfitness must be brought actually or constructively to the master's notice before he will be deemed negligent in continuing the servant in the employment.²⁷ But a servant originally competent, having become incompetent for any reason, will make his master liable for his acts injurious to other servants, where the master knew, or ought to have known, of his subsequent unfitness.

²⁴ Peterson v. American, etc., Co., 90 Minn. 343.

²⁵ Cooley, Torts (2d ed.), p. 660.

²⁶ Western Stone Co. v. Whalen, 151 Ill. 472. Coppins v. New York, etc., R., 122 N. Y. 557. Evidence of the servant's reputation for unfitness is competent. Chicago, etc., R. v. Sullivan, 63 Ill. 293.

²⁷ Park v. New York, etc., R., 155 N. Y. 215.

After the master has such knowledge he is bound to dismiss the incompetent servant.²⁸

If an employee know or learn that his fellow-servant is incompetent and continue in the employment without objection, he is commonly held to take the risk of such incompetency.²⁹ It is otherwise if he does not know. While it is the master's duty to employ a sufficient number of efficient co-servants, his failure so to do may be so patent a risk that the servant may be considered to assume it by continuing in the business, unless justified in believing he may so continue safely.³⁰ In some jurisdictions it is said "the law does not prescribe a rule so inflexible or unwise as that a servant must forthwith * * * or immediately quit the service of the master, upon the discovery * * * that he is working by the side of a negligent fellow-servant, upon the pain of conferring immunity upon the master for all liability for an injury incurred in consequence of such * * * incompetency. The true test in all such cases is, whether a person of ordinary prudence, acting with such prudence, would, under all circumstances, have refused to incur the risk."³¹

If a servant notifies the master, or the master is otherwise apprised of a defect or danger, and the master gives the servant to understand that the matter will be remedied, the servant may wait a reasonable time for this to be done and not thereby lose his rights. Hence, if a master promises to discharge

²⁸ Michigan, etc., *R. v. Gilbert*, 46 Mich. 176; *Lyttle v. C. & W. M. Railway Co.*, 84 Mich. 289.

²⁹ *Davis v. Detroit & Milwaukee R. Co.*, 20 Mich. 105.

³⁰ *Thorpe v. Missouri, etc., R.*, 89 Mo. 650.

³¹ *Norfolk, etc., Ry. v. Ampey*, 93 Va. 108.

an incompetent co-servant or employ a sufficient number of co-servants, the endangered employee may continue in his employment a reasonable time thereafter at the master's risk.³²

(5) *To warn of dangers.* Under certain circumstances it is the duty of the master to warn his servants of danger incident to the employment. "Where the master knows, or, had he used due care, would have discovered, that the employment is dangerous, and has reason to believe that the servant does not know the danger, and will not discover it in time to protect himself from injury, he is under a legal duty to give proper warning and instructions to the servant. The warning should be one and the instructions should be such as are suited to the circumstances of the particular case. If the servant is young and inexperienced, the instructions should be more minute than in the case of an adult, and especial care should be taken to make them intelligible." ³³

10. **Same—Operative or administrative act.**—The distinction between acts of a fellow-servant in performing his own duties, for which the employer is not liable, and acts of a servant as vice-principal in discharge of the non-assignable duties of the employer, is sometimes graphically expressed by terming the former "operative" and the latter "administrative" duties. In the latter case the act of the servant is the act of the master, and the rule of *respondeat superior* applies. The same employee may be both a fellow-servant and a vice-principal at the

³² Maitland v. Gilbert, etc., Co., 97 Wis. 476.

³³ Burdick, Torts, p. 168.

same time, depending upon whether he is performing an administrative or operative act.³⁴

11. **Same—Employer's own negligence.**—It must be remembered in applying the fellow-servant rule, that where negligence of the master, or of one for whose conduct he is answerable, concurs with that of one related as fellow-servant to the party injured, and the negligence of the master or his representative is a proximate or efficient cause of the injury, the master will be liable, notwithstanding the fellow-servant's concurring negligence. The fellow-servant doctrine only applies to cases where the fellow-servant's negligence has been the sole cause of the injury complained of.

12. **Contracting out.**—For a breach of any of the above non-assignable or statutory duties the master, it is generally held, may not contract beforehand with the servant for release from liability. Even an express agreement when made is considered void as against public policy.³⁵ In some states statutes expressly forbid such contracts. These, of course, control.

13. **Liability of negligent fellow-servant.**—The fact that an employee injured by the negligence of a fellow-servant may or may not have an action against the employer, does not in any way modify the usual tort rule that the person injured has a remedy against the one who wrongfully caused his injury. If one servant by negligence in his employ-

³⁴ *St. Louis Cons. Coal Co. v. Fleischbein*, 207 Ill. 593, 69 N. E. 963.

³⁵ *Lake Shore & M. S. Railway Co. v. Spangler*, 44 Ohio St. 571; *Chicago, etc., R. v. Maroney*, 170 Ill. 520.

ment injures a fellow-servant he is liable to the latter for damages caused thereby.³⁶ A wrongdoing servant is liable, moreover, to the master for damages the latter has to pay for the former's negligence, except where each is a tort-feasor.³⁷ Some cases limit liability to misfeasance. But most states include negligent nonfeasance.³⁸

14. Third defense of employer—Contributory negligence of injured employee.—The general rule of the law of torts that contributory negligence of the person injured bars recovery, applies with full force to employer's liability suits.³⁹

Care should be taken, however, to distinguish between contributory negligence and assumed risk, for both may arise in the same case. Thus, plaintiff claims that the platform on which he worked was unsafe and unlighted; if unsafe he may have assumed the risk; if unlighted, suitable torches may have been furnished which plaintiff negligently failed to use.⁴⁰ It is not necessarily contributory negligence for a servant to expose himself to danger to rescue a fellow-servant imperiled by the master's negligence.⁴¹

15. Burden of proof.—When a suit has been brought against the employer by a servant, the burden of proof is upon the servant to show that the injury resulted from such negligence, and that the negligence was the proximate cause of the in-

³⁶ *Osborne v. Morgan*, 130 Mass. 102.

³⁷ *Georgia, etc., R. v. Jossey*, 105 Ga. 271.

³⁸ *Murray v. Usher*, 117 N. Y. 542.

³⁹ See 12 M. A. L., Part IV, chap. III.

⁴⁰ *Kaare v. Troy Steel & Iron Co.*, 139 N. Y. 369.

⁴¹ *Saylor v. Parsons*, 122 Iowa 679.

jury.⁴² When the injured and offending employees are in the same common service, they are presumably fellow-servants within the general rule of assumed risk, and the burden is on the plaintiff to show differently.⁴³ It rests on the plaintiff to show the master's negligence in employing or retaining the servant whose wrongdoing caused the injury. That the master had notice or knowledge or by exercising ordinary care might have known of the incompetency is sufficient.

16. **Employer's liability statutes.**—Many changes in the foregoing rules have been made by statute, improving the condition of the employee. Where the entire field is covered by statutory enactment, the result is usually called an Employers' Liability Act. Sometimes such acts apply only to railroad employees. Such acts invariably modify one or more of the common law defenses of the employer described above.

The English Employers' Liability Act of 1880, re-enacted in many of our states, is typical of such legislation. This Act provides in substance that when personal injury is caused to a workman by reason of (1) any defect in the condition of the ways, works, machinery or plant connected with or used in the employer's business, which defect arose from, or had not been discovered or remedied, owing to the employer's negligence or that of some one in his service entrusted by him with seeing that the ways, etc., were in proper condition, or (2) the negligence of any one in the employer's service who has any

⁴² *Montgomery Coal Co. v. Barringer*, 218 Ill. 327.

⁴³ *Chicago, etc., R. v. Leach*, 208 Ill. 198.

superintendence entrusted to him, while exercising such superintendence, or (3) the negligence of any one in the employer's service to whose order or directions the workman at the time of the injury was bound to and did conform, such injury resulting from such conformance, or (4) the act or omission of any one in the employer's service, done or made in obedience to the employer's rules or by-laws or to particular instructions given by any one delegated with the employer's authority in that behalf, the injury resulting from some impropriety or defect in the rules, by-laws, or instructions, or (5) the negligence of any one in the employer's service who has charge and control of any signal points, locomotive, engine or train upon a railway; in each case, the injured workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work, unless the workman knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given, information thereof to the employer, or some person superior to himself in the employer's service, unless he was aware that the employer or such superior already knew of such defect or neglect.⁴⁴

Important recent Federal legislation on this subject, affecting railroad employees in interstate commerce only, is contained in the Second Employers' Liability Act and the Safety Appliances Act.

⁴⁴ For a full discussion the reader is referred to Reno, *Employers' Liability Acts*. The cases almost uniformly hold that such acts are constitutional.

CHAPTER II.

WORKMEN'S COMPENSATION ACTS.

17. **Nature of Workmen's Compensation Acts—****Sociological statutory reform.**—Workmen's Compensation Acts differ mainly from the prior system of Employers' Liability, in that the obligation of the employer is not based upon fault or negligence. Instead of from a personal, the problem of injuries to employees, is handled from a sociological viewpoint. Injuries to workmen are regarded as a social loss, because of the destruction of labor power involved, the dependency of the injured employee and his family upon friends or public or private charity, and the many secondary consequences of poverty following injury or death of the wage earner of the family. This social loss, being caused by industry (as accidents are inevitable in any business) should be borne by industry. It is as much a part of the cost of operation as the cost of raw materials, labor, machinery. Accordingly, Compensation Acts fix responsibility upon the employer for all injuries to employees which can reasonably be attributed to the operation of the business, i. e., which occur in the course of and arise out of the employment, without regard to the fault or negligence of any party. The cost of paying for such injuries is in turn added to the cost of production and passed on to the consumer,

thus equalizing the cost of industrial injury throughout the entire community.⁴⁵ The common law doctrines of assumption of risk, fellow-servant and contributory negligence are therefore abolished in all Compensation Acts.

18. **Same—Use of insurance principle.**—Workmen's Compensation legislation is fundamentally based upon principles of insurance, and unless provision be made for a system of insurance it will probably be unconstitutional. This is because, if such laws be regarded solely as imposing a liability upon the employer to pay money to his employees under certain contingencies, there is a limit to the power of the legislature to take the money of one person and give it to another in the absence of any fault or wrongdoing of the first.⁴⁶ If, however, such laws be regarded as imposing an obligation upon employers to insure their employees against the hazards of the employment, with a penalty for failing to insure against liability for the entire loss when it occurs, such law can be considered a reasonable exercise of the police power. This is the correct view of compensation statutes. The cost of industrial injuries is imposed upon industry, being equalized between individual employers and plants by the payment by each of its pro rata share (insurance premium) into a common fund (insurance company or companies), from which the injuries (losses) are paid as they occur. In interpreting compensation statutes, furthermore, recourse is frequently had to

⁴⁵ *Western Indemnity Co. v. Pillsbury et al.*, 170 Cal. 686.

⁴⁶ *Id.*

insurance law, the rights of the employee being construed as if he were the beneficiary of an insurance policy covering accidents while at work instead of as if he were prosecuting a damage suit against his employer.

From the insurance viewpoint Compensation Acts in this country may be grouped under the three following heads:

(1) *Voluntary insurance*.⁴⁷ Here the employer may either insure or pay his own losses. If he insures, he may pay his premium to any private insurance company authorized to sell compensation insurance, or, in some states, to a state fund created for this purpose. Upon insuring he is entitled to be relieved from all liability upon the happening of an accident to his employee, by giving certain notices and proving the fact of his insurance.

(2) *Compulsory insurance*. Here the employer is compelled to insure in some authorized insurance carrier, public or private, unless he secure permission from some state authority to pay his own losses, and give adequate guarantee of solvency.⁴⁸

(3) *State insurance monopoly*. In a few states insurance is made compulsory, and required to be in a state fund only, private companies being excluded from the field.⁴⁹ In such cases the employer is not even a nominal party to proceedings insti-

⁴⁷ This system prevails in California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Nebraska, Pennsylvania, Rhode Island, Texas, Vermont, Wisconsin.

⁴⁸ This system is found in Maryland, Massachusetts, Montana, New Hampshire, New York, Oklahoma.

⁴⁹ Used in Nevada, Ohio, Oregon, Washington, West Virginia, Wyoming.

tuted by an injured employee to enforce his rights. By insuring his men, the employer has discharged his entire legal duty, and subsequent litigation is against the state fund only.

19. History of Workmen's Compensation legislation—European.—The first Workmen's Compensation Act was passed in Germany in 1884. Its passage was secured, not by the socialist element, but by the political group led by Bismarck, and was one of a group of measures tending to State Socialism, designed to increase the power of the state and the welfare of the working classes. Germany has since improved and extended its accident insurance legislation, and has added to it other social insurance measures, such as compulsory insurance of the working classes against illness, invalidity and old age. These extensions have spread through most of Europe, and eventually crept into American legislative fields.

Austria followed Germany with a Compensation Act in 1887, Norway in 1894, and England with a comprehensive statute in 1906, superseding acts of partial application of 1897 and 1900. By the middle of the century, accident compensation acts in some form were in force in practically all countries, including all the states of the United States.⁵⁰

20. Same—United States—Voluntary and compulsory acts.—The first American Compensation Act was passed in Maryland in 1902. It applied to only a few occupations and was declared unconstitutional

⁵⁰ Bulletin 203, U. S. Dept. of Labor, Bureau of Labor Statistics, p. 11.

in 1904, upon the grounds that it denied the right of trial by jury, and conferred judicial functions upon an executive officer. Montana adopted a Compensation Act in 1909, which was declared by its Supreme Court to be valid in its essential features, but unconstitutional upon a minor ground. Maryland in 1910 and New York in 1911 enacted a general compulsory law for hazardous occupations, the latter being declared unconstitutional in the celebrated case of *Ives v. South Buffalo R. Co.*,⁵¹ to be discussed more fully hereafter. A constitutional amendment was promptly passed in New York, under which a new statute has been enacted and held valid.

The decision in the *Ives* case had the effect of turning the trend of compensation legislation for a time from compulsory to elective laws. By a compulsory law is meant one obligatory upon employers generally, regardless of their consent. In this sense the rules of Employers' Liability, discussed in the preceding chapter, are compulsory. An elective law, upon the other hand, is one where only such employers and employees are bound by it as have contracted that their respective obligations and rights, in the event of accident, shall be governed by such statute. This agreement is usually termed an "election" to come within the provisions of the Compensation Act, and is made by the employer's filing with some state officer a written statement that he accepts the provisions of the compensation law and posting a notice informing his employees of his action. As-

⁵¹ 201 N. Y. 271, 94 N. E. 431.

sent by the employees is conclusively presumed from their failure to file a written objection to being brought within the provisions of the statute within a fixed time. In many states the process is reversed, the assent of both employer and employee being presumed unless a notice of non-acceptance be filed within the time provided.

To encourage the employer to come under the Compensation Act, his common law defenses discussed in the preceding chapter are usually abolished in Employers' Liability proceedings, so that if he desires to remain subject to the earlier system he must defend damage suits without their aid.

More recent statutes have returned to the compulsory type, as fear of the decision in the Ives case being followed in other states has lessened. At the present time all the states of the U.S. have enacted compensation laws of one form or another.

The Federal government has from time to time provided similar protections for its employees. The pension and retirement provisions for its military forces are typical and of long standing, though not usually thought of in this connection. Compensation Acts were passed in 1882 for the Life Saving service, in 1900 for railway mail clerks, and later extended to other postal employees, in 1908 for Panama Canal and railroad employees, and in 1914 for Alaska railway employees. In 1916 a general compensation statute covering practically all Federal employees went into effect, repealing all prior laws.

21. Employments covered.—Different provisions obtain in different states as to what employees are within the protection of the Act. Every state but two exempts agricultural laborers,⁵² and every state but one, domestic servants.⁵³ Some states cover only employees in hazardous occupations,⁵⁴ while others make no such distinction. Sixteen states exempt all employments having less than three to six employees. Nearly all exempt casual employees and persons not employed for the purpose of the employer's trade or business. In practically all statutes, however, provision is made for the voluntary inclusion by election of employees otherwise exempt.

22. When employer is liable—General rule.—In most jurisdictions an employer is liable to compensate his employees or their dependents for any accident proximately causing disability or death, where such accident occurs in the course of and arises out of the employment, without regard to the negligence of either party. The meaning of these terms will be explained later. In some states the word "injury" is substituted for the word "accident,"⁵⁵ the former having a broader meaning. In a few states the requirement that the injury arise out of the employment is omitted.⁵⁶

⁵² Hawaii and New Jersey.

⁵³ Oklahoma.

⁵⁴ Arizona, Louisiana, Maryland, Montana, New Hampshire, New York, Oklahoma, Oregon, Washington, Wyoming.

⁵⁵ California, Connecticut, Iowa, Massachusetts, Michigan, Montana, New Hampshire, New York, Ohio, Washington, West Virginia, Wisconsin, Wyoming, Federal Government.

⁵⁶ Ohio, Pennsylvania, Texas, Washington, Wisconsin, Wyoming, Federal Government.

23. Same—Accident or injury—Occupational diseases.—The word “accident” does not have a well defined legal meaning. In the construction of personal accident insurance policies a narrow significance is usually given. Thus, bodily injury brought on by overstraining has been held not to be due to accidental means, in the absence of slipping or stumbling,⁵⁷ and a violent external force is often required to constitute an accident under such policies. But in construing Workmen’s Compensation Acts the term is used in its popular sense, to mean any unlooked-for mishap or untoward event.⁵⁸ Hence, it includes injuries due to overstraining, as well as slipping, falling, or being struck by an object.⁵⁹ It includes injuries due to oversight or negligence, as well as what are termed pure accidents, for which no one is at fault. It also includes assaults, because the attack is unexpected and fortuitous as to the assaulted employee.⁶⁰

The term “accident” is usually construed not to include illness or disease resulting from industrial conditions, such as lead or phosphorous poisoning. To include such so-called “occupational diseases” the word “injury” is generally inserted in the statute, instead of the word “accident.” Where the broader term is employed, almost any illness caused by perils attending the employment or by some in-

⁵⁷ *Rock v. Travelers Insurance Company*, 172 Cal. 462.

⁵⁸ *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458. See also L. R. A., 1916 A, 29, 227.

⁵⁹ *Southwestern Surety Insurance Company v. Pillsbury*, 172 Cal. 768.

⁶⁰ *Trim Joint School District v. Kelley*, 136 L. T. J. 605, 6 N. C. C. A. 1010 (note).

cident occurring in the course of the work, is included within the protection of the act. The difference between industrial accident and disease is that the former occurs suddenly at some definite time and place, while the latter is brought about slowly by repeated exposure to small amounts of the dangerous substance over a long period of time. Illness due to being overcome on some particular day by mine gas is accidental, but if the same illness is brought about more slowly by breathing a small and diluted portion of the same gas daily over a long period of time, without being overcome and rendered unconscious at any particular time, it is an occupational disease.

24. **Same—Proximate cause.**—The law of proximate cause has been discussed elsewhere in detail.⁶¹ In the present connection, the rule is simpler than in negligence cases. No element of reasonable anticipation need be established to connect a particular result,⁶² as the law is not concerned with fixing blame for a result, but merely with finding the origin of it. To find that a certain injury is the proximate cause of ensuing disability or death, it is necessary to find merely that an unbroken relationship of cause and effect exist between the two, and that the cause be not so far separated from the result by time or place as to be too remote. Where blood poisoning develops from a cut, or where an injured employee dies from the effect of anaesthetic administered during the course of an operation required by his injury,

⁶¹ See 12 M. A. L., Part IV, chap. I.

⁶² *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247.

the injury is clearly the proximate cause, as the result is in the natural course of events and not too far removed. Where an employee is cut upon the arm and infection develops which is eventually overcome and practically healed when the employee engages in a boxing bout, resulting in a renewed infection, the original injury is not the proximate cause of the later infection, as it has been displaced by a new and independent intervening cause.⁶³ In other words, the original cause has become remote or even entirely disconnected from the final result.

In many cases it happens that two or more different causes combine to produce a given result, as where an employee with a broken leg develops delirium tremens after a few days of enforced inactivity, due to the combined effect of overindulgence in alcoholic liquors, the shock of the accident, and deprivation of customary exercise. An injury may be greatly delayed in healing by the presence of pre-existing tuberculosis or syphilis. In such cases the accident is nevertheless the proximate cause of the entire disability, provided the effect be substantial and not trivial. It is often said that the employer takes his men as he finds them, which means that the Workmen's Compensation Act is designed for the protection of the entire working class, strong and weak alike, and is not limited to the protection of physically perfect employees. It is always necessary, however, to find a real accident which has a real

⁶³ *Kill v. Industrial Commission of Wisconsin*, 162 Wis. 544, 152 N. W. 148.

connection with the later disability, without regard to the existence of other contributing causes.

25. **Same—Disability.**—Where an employee is injured, he is not entitled to compensation, except his medical expenses, unless disability ensue. By disability is meant inability to earn. Only loss of wages is compensated,⁶⁴ no recovery being allowed for pain, suffering, humiliation, or by way of exemplary damages, or other indirect items of loss for which redress is given under the common law. Hence, where an employee returns to work while ill, or is put by his employer at light work for full wages, no compensation is due, even though he be unable to do his customary work.

An exception is made to this rule in cases of permanent injury, such as the loss of a hand, foot or eye. Here a statutory rate of compensation is usually provided without regard to the period of time that the employee is away from work and not receiving wages. The exception is, however, apparent rather than real, as such employee has in fact sustained a permanent reduction of earning power by reason of his loss, which will sooner or later reduce his wages, either by affecting his productive capacity or by causing discrimination against him in the open labor market in seeking new employment. Compensation in such cases is to offset a handicap which will affect his wages throughout life.

26. **Same—Dependency.**—If the injury sustained by the employee results in death, compensation bene-

⁶⁴ *Marhoffer v. Marhoffer*, 220 N. Y. 543, 116 N. E. 379.

fits are due only to such persons as may have been dependent upon him for support at the time of the injury or death. A claim for death benefits cannot be brought by the heirs, next of kin, executor, administrator, widow or children, *as such*, but only by "dependents." As with disability payments, relief is allowed only to replace lost earnings devoted to support.

For near relations actually or presumptively supported by the employee, a statutory conclusive presumption of total dependency is invariably provided. Such cases include a wife living with her husband at the time of his injury, or, in some states, where not living with him but where he is at such time legally liable for her support. Minor children are included where living with the parent, or legally entitled to support from the parent, and children over the age of majority but physically or mentally unable to earn a living.

In all cases not covered by such presumptions, the question is one of fact, as the fact may be at the time of the injury. Such dependency has been well defined by the Rhode Island Supreme Court in *Dazy v. Apponang Co.*⁶⁵ as follows: "The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with ordinary necessities of life suitable for per-

⁶⁵ 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594, L. R. A. 1916 A (note), 250.

sons in their class and position. *Boyd Workmen's Compensation*, Sec. 234; *Main Colliery Co. v. Davies*, 2 W. C. C. 108; *Howells v. Vivian & Sons*, 4 W. C. C. 106. The petitioner is not bound to deprive himself of the ordinary necessities of life to which he has been accustomed in order to absolve the respondent from the payment of damages, nor can he on the other hand demand money from the employer for the purpose of adding to his savings or investments. The expression 'dependent' must be held to mean dependent for the ordinary necessities of life for a person of his class and position and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside. *Simmons v. White Bros.*, 1 W. C. C. 89."

In Connecticut, the Court of Appeals in Appeal of *Hotel Bond Co.*,⁶⁶ defined dependency as follows: "A dependent under the act is not necessarily one to whom the contributions of the injured or deceased workman are necessary to his or her support of life. The test is whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent. *Howells v. Vivian & Sons*, 85 L. T. 529; 1 *Bradbury's Workmen's Compensation* 573. Partial dependency may exist, though the contributions be at irregular intervals and in irregular amounts, and though the dependent had other means of support. *Bradbury's Workmen's Compensation*, 574.

⁶⁶ *Hotel Bond Co. Appeal*, 89 Conn. 143, 93 Atl. 245.

Dependency is thus in each case a fact to be determined. *Main Colliery Co., Ltd. v. Davies*, 16 T. L. R. 460."

Dependency may be total or partial. It is total if so provided by a statutory presumption, or if the support of the dependent comes solely and entirely from such employee. It is partial if the dependent was, at the time of the injury, supported partially from other sources.

27. Same—Course of employment.—An injury occurs in the course of the employment if it is sustained while the employee is performing the duties of his employment, or doing something reasonably incidental to his duties. This requirement relates to the time and place of the accident, and not to the manner in which it occurs or its causation.⁶⁷ Where an employee is actually at work, the case is clear. He is in the course of his employment in many cases, moreover, when not actually at work at the time. Momentary pauses during work, to obtain a drink, refreshment, or to rest, where permitted,⁶⁸ are within the course of the employment, just as going for tools or waiting for another supply of materials to work upon. It has been held that an employee who was smoking while working his wagon, did not take himself out of the course of his work by dismounting to pick up his pipe which he had dropped.⁶⁹ The test is whether the act be one which an employee

⁶⁷ *Fitzgerald v. Clarke* (1908), 2 K. B. 796; *Bryant v. Fissell*, 84 N. J. L. 42, 86 Atl. 468.

⁶⁸ *Brooklyn Mining Co. v. Industrial Accident Commission*.

⁶⁹ *McLaughlin v. Anderson* (1911), G. C. 529; 4 B. W. C. C. 376.

might reasonably do while at work. A workman is not a machine, and must be treated as likely to act as workmen ordinarily would in regard to such intervals.

Similarly, an employee is allowed considerable latitude with respect to accidents during the noon hour, also while going to work in the morning or leaving work at night, as long as the injury is sustained upon the employer's premises while the workman is reasonably there in connection with his duties and not at an unreasonable hour. He is within the course of his employment if injured after he has finished his day's work, put away his tools, and while changing from his working to his street clothes, or even descending the elevator on his way to the street. If, however, the accident happens upon the public streets or otherwise off the employer's premises while going to and from work, compensation is not allowed, as when using the public streets he is acting as a member of the general public. A distinction should be drawn between those cases where the employee is merely going to and from work, and those in which he is using the public streets upon a particular errand for his employer, in which case the service which he is performing causes him to be in the course of his employment.

28. Same—Arising out of the employment.—In most states an injury must both occur in the course of and arise out of the employment, to be compensable. An injury may be said to arise out of the employment where it is caused by some danger incident to the work, i. e., where the employment ex-

poses the employee to the risk of such injury. The term refers to origin or causation of the injury, instead of the time and place of its occurrence.⁷⁰ For instance, if an employee while on duty be assaulted by an enemy for personal reasons, the assault occurs in the course of the employment, as it happens while he is at work, but does not arise out of it because there is no causal relation between the assault and the nature of the employment. But if a watchman or guard be shot by burglars while protecting his employer's premises, the injury both occurs in the course of the employment and arises out of it.

The situation is free from difficulty where the employee is hurt by the materials he works with, as where he is cut by tools, mangled by machinery, struck by falling objects, or strained or ruptured by heavy lifting. Similarly, there is no difficulty where the injury is due to defective condition of the working premises, or by slipping or falling while at work, the latter being incidental to any work.

The situation is different where the injury is due to (1) ordinary street, automobile or railroad accidents;⁷¹ (2) bites of wild animals or poisonous insects;⁷² (3) assaults by other human beings,⁷³ or (4) lightning, sunstroke, freezing or other exposure to the elements or acts of God.⁷⁴ In these four classes

⁷⁰ *Bryant v. Fissell*, *supra*.

⁷¹ *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325.

⁷² *Amys v. Barlon* (1911), 5 B. W. C. C. 117.

⁷³ *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509.

⁷⁴ *Klawinski v. Lake Shore-Michigan Southern R. R. Co.*, 185 Mich. 643, 152 N. W. 213.

of cases the risk of injury is said to be a risk of the "commonalty," i. e., a risk incident to members of the entire community, whether employed in any particular industry or at all, and does not ordinarily arise out of the employment. Where, however, *special exposure* to any of these four classes of risks by reason of the peculiar nature of any particular employment is proved, the injury may still come within the rule, as where a traveling salesman is hurt in a railroad accident, a wild animal trainer is bitten by one of his charges, a night watchman is shot by a burglar, or an employee is struck by lightning while working in a peculiarly exposed place.

Injuries due to sportive acts or horseplay of fellow-employee do not arise out of the employment.⁷⁵

29. Same—Measure of compensation recoverable.
—The word "compensation" is a misnomer, as an injured workman is never fully compensated for the loss sustained by him. It is intended merely that the payments tide him over his period of adversity. Payments are, except for special benefits, in the form of a percentage of wages, usually 50 to 66-2/3 per cent. Under the Wisconsin Act, a typical compensation statute, a workman who is under complete temporary disability is entitled to 65 per cent of his weekly wages each week until he recovers. If he is but partially disabled, i. e., able to do light work, he receives 65 per cent of his loss in wages weekly until his recovery. In California, the benefit is the same for temporary injuries, and for permanent injury the workman is allowed 65 per cent of his wages weekly for a suffi-

⁷⁵ Fitzgerald v. Clarke & Son, 1 B. W. C. C. 197, 2 K. B. 796.

cient number of weeks to enable him to adjust himself to his changed physical condition and to develop an earning capacity along new lines, the period of time being fixed with reference to his age, occupation and injury. In more serious permanent injuries, where the eventual regaining of any earning capacity is not expected, a life pension is allowed, which in the case of loss of both eyes or both arms, is as high as 40 per cent of the average weekly wage after the maximum for temporary disability, 65 per cent of wages for 240 weeks, is reached.

In case of death, a percentage of the wages of the deceased employee is paid the dependents weekly until a certain sum, usually three times the annual earnings, has been paid.

In all states a waiting period, varying from three to fourteen days, is provided, during which time immediately following the injury no compensation is allowed. This is mainly to encourage employees suffering trivial injuries to return to work at once instead of prolonging recovery because of the compensation benefits.

In all states, also, a schedule of maximum payments is provided, which is low in comparison with judgments in Employers' Liability cases. In California, the maximum death benefit for employees of high earning capacity is \$7,000.00, as against judgments in damage suits under similar circumstances of \$25,000.00, or higher. Under the compensation system the employer is therefore protected against occasional excessive verdicts, while at the same time the injured employee, though losing a gambler's

ance for heavy judgments in exceptional cases, receives adequate financial support in all cases of industrial injury, with but slight hazard of litigation. In addition to the indemnities provided for disability and death, most statutes allow the injured employee his medical and hospital expenses, either for a limited period of time or as long as required. Such treatment is to be provided by the employer, who is allowed, for his own protection, the right of naming the physician to treat the case. If the employee does not accept the medical facilities offered him, he must secure treatment at his own expense, but if the employer fails to offer treatment after knowledge of the injury, the employee may procure treatment from physicians of his selection, at the employer's expense. A funeral benefit is also frequently allowed, with a maximum of a few hundred dollars.

30. Defenses of employer—Want of notice.—If all disability accidents are to be compensated, it will frequently happen that accidents which are deemed trivial at the time will cause serious illness at a later date. Infections or ulcerations from small scratches or bruises are a common example. To avoid unnecessary litigation over the origin of such conditions, and to protect the employer against imposition by the palming off upon him of disabilities in fact originating away from his employment or from natural causes, prompt notice to the employer upon the happening of an accident is necessary. All compensation acts therefore require notice to the employer within a short time after the accident, varying from

five to thirty days. Unless such notice be given, the claim is barred. Various exceptions are made to avoid undue hardship, such as a provision that notice be given as soon as practicable, or that actual knowledge of the employer be equivalent to notice.

31. Same—Intoxication and wilful misconduct.—

While the basis of compensation legislation is that the liability of the industry for injuries occurring in the course of its operation shall be without regard to the fault of either employer or employee, it is inexpedient to press this theory to the utmost. While the negligence of an employee will not vitiate his claim, there are two causes of injury, which, for reasons of public policy, debar him from compensation.

One of these defenses is intoxication. To be an effective defense, however, it is necessary that the drunkenness of the employee be the cause of his injury, and not mere coincident with it. If he would have received the injury if he had been sober under the same circumstances, as where he is injured by a boiler explosion which he did not cause, the intoxication does not affect his right. But where his drunken condition brings about his accident, no benefits can be claimed.

The other defense is wilful misconduct, or as it is expressed in the Massachusetts Act, "serious and wilful misconduct." The meaning of this term has not, as yet, been accurately defined by any court. Necessarily it must mean something more serious and of a different nature from contributory negli-

ence, including gross contributory negligence,⁷⁶ as such common law defense has been abolished in practically all compensation statutes.

As to wilfully self-inflicted injuries, there can be no doubt. Any such injury would clearly be due to wilful misconduct, and in addition, would probably seldom, if ever arise out of the employment. While frequent in negligence suits, self-inflicted injuries are rarely, if ever found in compensation cases, because of the effect of the waiting period following the injury during which no compensation is payable, the low scale of benefits, and close medical scrutiny of injured employees.

The term has been partially defined by the Supreme Judicial Court of Massachusetts⁷⁷ as "Serious and wilful misconduct is much more than mere negligence or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."

The fundamental element in wilful misconduct is breach of the duty of fidelity and obedience which the servant owes to his master. Misconduct implies reprehensible, disloyal or disobedient behavior as opposed to mere carelessness or negligence. Accordingly, it is universally held that deliberate disobedience of rules made by the employer for the protection of his workmen, is a bar to recovery of benefits. Failure

⁷⁶ *Reeks v. Kynoch, Ltd.*, 3 B. W. C. C. 14, 2 N. C. C. A. (note) 860.

⁷⁷ *In re Burns*, 105 N. E. 601, 5 N. C. C. A. 635.

of a lineman to wear rubber gloves or a safety belt, after he has been ordered to do so,⁷⁸ or violation of instructions to use glasses, guards or other safety devices supplied by the employer, is wilful misconduct. Where violation of a rule is claimed it is necessary, however, to show that the rule was reasonable, intended for the safety of the employee, and has been enforced with reasonable diligence by the employer. Not every violation of a rule is wilful misconduct.⁷⁹

Another class of cases coming within this defense is found where an employee has violated a positive rule of law of a penal or criminal nature, and such violation has led to his injury. In the case of *Fidelity and Deposit Company of Maryland v. Industrial Accident Commission*,⁸⁰ an employee was driving an automobile at a rate of speed in excess of the legal speed limit, which was a statutory offense. The automobile struck a sand streak in the road and turned over, killing him. The violation of law was held to amount to wilful misconduct within the Compensation Act.

A third class of cases may be inferred, although seldom met in practice, where an employee, not violating any positive rule of the employer or provision of law, does some foolhardy act in a spirit of bravado or dare-deviltry which causes him injury, such as striking a match upon a powder keg. Such act would

⁷⁸ *Great Western Power Co. v. Pillsbury* (Cal.), 149 Pac. 45, 9 N. C. C. A. 466, L. R. A. 1916 A (note), 244.

⁷⁹ *Jensen v. Bowen Bros. & Co.* (New Zealand), Vol. 8, Decisions under the Workmen's Compensation & Accident Act, 49, 50. *Diestlehorst v. Industrial Accident Commission*, 24 Cal. App. Dec. 308.

⁸⁰ 171 Cal. 728, 154 Pac. 834.

more than gross contributory negligence because the positive intent shown.

To be a valid defense, the misconduct must always be *wilful*, i. e., intentionally disobedient or culpable. Where the violation of an order is due to temporary forgetfulness or inattention without any intention on the part of the employee of opposing his will against that of the employer, there is no wilful misconduct. In *In re Nickerson*,⁸¹ the Massachusetts Supreme Judicial Court said in this connection: "Here the Industrial Accident Board has found, in accordance with the report of the arbitration committee that this was not 'serious and wilful misconduct'; that the shafting and machinery were about to stop any moment, in the mind of the employee, when he could continue to work with safety. His decision to do some whitewashing during this very brief interval seems more like a sudden thought than a wilful act. It seems that it should be fairly regarded as a minor transgression, at most, from his standpoint, and not as 'serious and wilful misconduct.' * * * The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect the disobedience must have been wilful, or as was said by Lord Loreburn, in *Johnson v. Marshall, Sons & Co., Ltd.*, App. Cases 409, 411, 'deliberate, not merely a thoughtless act on the spur of the moment.' "

Whether an employee was forgetful or intentionally disobedient in violating a safety rule, is a question of fact to be determined from all the evidence.

⁸¹ 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645.

The mere statement of the employee after the accident, that he forgot, need not necessarily be accepted as final, even if there be no positive testimony to the contrary, as the bare fact of intentional commission of the act complained of raises a presumption of wilfulness and the compensation tribunal may choose between them. Extreme youth of the employee is evidence to strengthen the probability of inadvertence.⁸² Where, however, the employee is dead as a result of the accident, leaving no explanation of it, the bare fact of violation of the order speaks for itself, and the presumption of wilfulness is controlling in the absence of mitigating circumstances.⁸³

32. Procedure under Workmen's Compensation Acts—In general.—One of the striking changes brought about by compensation has been in procedure. Since the amounts involved are relatively small, and are payable in weekly installments, there is little room for court costs. A jury trial, costing at least \$50.00 per day, is out of the question where the plaintiff is seeking benefits for an idleness of ten weeks and must support himself out of compensation payments of \$12.00 per week while disabled. Similarly, compensation litigation must be expeditious. Instead of a large cash recovery at the end of months or years of litigation, as occurs under Employers' Liability if the injured workman be suc-

⁸² *Diestlehorst v. Industrial Accident Commission*, *supra*.

⁸³ *Pacific Coast Casualty Company v. Industrial Accident Commission (Cal.)*, 162 Pac. 1040. *Diestlehorst v. Industrial Accident Commission supra*.

successful, the compensation system reduces the recovery to small weekly payments, intended to be used for support at the time the support is needed. Inexpensiveness and speed are therefore the keynote of procedure in this class of cases. The former is obtained by abolishing filing and court costs and jury fees, and in making proceedings nontechnical, so that the services of an attorney can be dispensed with. Speed is gained by the abolition of the demurrer and various motions prior to trial, by summary and expeditious method at trial, without much regard for rules of evidence, and by shortening the time allowed between different stages of the proceeding.

33. Same—Compensation tribunals—Courts or administrative boards.—Our judicial system, as now organized, is not competent to give the inexpensive, speed and accuracy of decision necessary for Workmen's Compensation litigations. The higher courts are able, as a rule, with much painstaking care, deliberation and expense, to give a just decision in cases of sufficient importance to warrant it. The lowest courts, usually presided over by justices of the peace, can give quicker decisions at less expense, but not the correctness of decision required in the administration of a complicated statute passed to accomplish a certain purpose. Accordingly in many of our states the administration of the Compensation Act has been placed in the hands of an administrative board or commission.⁸⁴ Historical precedents for

⁸⁴ In the following states administration of the law has been taken from the courts and placed in such administrative bodies: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massa-

this step are found in the Interstate Commerce Commission and State Railroad and Public Utility Boards. Constitutional questions frequently arise as to whether such bodies belong to the executive or judicial department of the government, and if executive, whether they are properly invested with judicial or quasi-judicial powers.

The decisions of such Boards are usually called *Awards*, and are enforced by being filed with the Clerk of some court of general jurisdiction, and having the judgment of such court entered upon them. Thereafter execution proceeds from such court as if judgment had been originally entered therein.

Trial by jury is not allowed, because of the time and expense involved. Usually the trial is before a Member of the Board, or Referee appointed by it. In some states, as in Massachusetts, it is before a Board of Arbitration chosen by the parties for each case, one of the members being always a Member of the State Industrial Accident Board. Hearings or trials are held in any part of the state convenient to the witnesses, being set specially for each case rather than in specified cities or on regular circuits.

34. Same—Pleadings.—Pleadings are simplified in compensation practice, so that proceedings may be nontechnical and, except in difficult cases, conducted without legal aid. The declaration or complaint is usually termed an application, and is generally made upon printed forms supplied by the

Massachusetts, Michigan, Montana, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, Wisconsin, and the United States.

ate, eliminating the necessity for professional assistance in drafting. While an answer is always permitted to acquaint the applicant before trial, with the issues he will be called upon to meet, no default is taken if through mistake or ignorance it is not filed. Instead, the case will proceed to trial and testimony be taken upon the issues developed at the trial, the only penalty for failure to answer being the imposition of costs or granting of postponements if applicant is put to the expense of summoning unnecessary witnesses or is surprised. The only function of the answer is to assist the parties in preparing for trial, as the case is decided upon the facts developed at the trial, instead of upon the merits or demerits of the pleadings.

Demurrers and preliminary motions are not allowed, the case being set for trial immediately upon the filing of the application. As the trials are always short, speedy and informal, the absence of a preliminary opportunity to test out the merits of the case by general demurrer does not work a hardship, even in the few cases where a decision upon demurrer would terminate the entire controversy; and the delay and expense occasioned in the courts by such preliminary matters are avoided.

35. Same—Trial—Rules of evidence.—Trials of compensation cases usually denominated "hearings," are, as above stated, summary and informal. They are presided over by a Member of the Board or Commission, or by a Referee appointed by it. They are regarded, not as a contest of skill between opposing counsel, in which the Judge sits as umpire and is

powerless to direct the proceeding to any substantial extent, as is often the case in the regular courts, but as an official inquiry or investigation into the facts, in which the presiding officer takes the leading part in ascertaining the merits of the controversy. The examination in chief of the witnesses, as well as the direction of the order of production of testimony, is usually conducted by the Commissioner or Referee. The function of attorneys, if present, is merely to assist the Board in the inquiry, and not to present their client's case upon their own responsibility. In this respect the procedure may be compared to that employed in a court-martial, coroner's inquest, legislative investigating committee, or other administrative bodies empowered to ascertain particular facts.

The attitude toward rules of evidence is striking. In most states it is provided that the Compensation Board shall not be bound by the technical rules of evidence. The California Act, which frequently has been amended, provides as given below,⁵⁵ the pro-

⁵⁵ "Sec. 60. (a) All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission; nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute of any evidence not admissible under the said common law or statutory rules of evidence and procedure."

vision being borrowed largely from the Connecticut act.

Such exemption from the rules of evidence is not so arbitrary as might seem, for the reason that the English common law of evidence has been created solely to fit the necessities of the English jury system. Its purpose is to accomplish a preliminary scrutiny of the evidence before the jury is allowed to receive and consider it, lest the jury be prejudiced by improper or less valuable testimony. The law of evidence, as we know it, does not exist in continental European countries, and has not been applied in English and American special courts which sit without jury, such as courts of Chancery, Probate and Admiralty, or legislative or administrative committees or tribunals generally.

The appellate courts have not entirely acquiesced in the exemption from rules of evidence granted compensation boards, having annulled awards of compensation benefits in several instances because of hearsay testimony. This topic will be discussed more fully in the next section.

Changes have also been made in the matter of expert witnesses and the right of medical examination of persons claiming compensation. Where the testimony of a medical or other expert witness is desired, he is usually appointed and paid by the compensation tribunal direct, upon the advice of its medical department. This policy results in the securing of superior and impartial advice upon important questions of fact, and frees expert testimony from the scandal thrown about it in recent years in the courts.

Any party to a proceeding may, of course, present such expert testimony as he desires, as in other proceedings. A permanent staff of examining physicians is usually employed by the tribunal for routine examination of claimants, and to assist in the detection and prevention of malingering.

The employer or insurance company has the right to have a claimant for disability benefits examined at any time by a practicing physician chosen by it, so long as the request specifies a reasonable time and place, and any refusal on the part of the employee to submit to such examination suspends or bars his right to benefits.

36. Same—Review by higher courts.—The mode of review of compensation decisions by the higher courts differs in different states. In jurisdictions where compensation cases are tried in the courts like ordinary cases, the usual mode of appeal prevails, with provision for limiting the scope of the appeal and securing greater expedition in final decision.

In states where the administration of the Compensation Act is entrusted to an administrative Board or Commission, the review of its decisions is usually by writ of certiorari, in some cases termed a writ of review, issued only by the higher appellate courts, instead of by ordinary appeal or by writ of error. In some states the award of the Board is filed in the Superior Court and the judgment of that court entered upon it, appeal thereafter being in the usual mode for judgments of that court. As certiorari is the most common mode, this section will be limited to a short discussion of procedure under it.

The writ of certiorari at common law lay only to determine whether a subordinate body, executive or judicial, and exercising judicial or quasi-judicial powers, has acted within its jurisdiction. If the body had jurisdiction over the controversy it had attempted to decide, the merits of its decision or the propriety of the procedure employed in the trial of the case, could not be inquired into by the reviewing court. The scope of certiorari was therefore said to be limited to the determination of whether the jurisdictional facts were present, necessary to give the body power to hear and determine the case. As extended by the decisions of the courts in recent years, and particularly by decisions in compensation cases, certiorari may now be said to allow review of every important question of substantive law presented in the case, not only to see if the Board had jurisdiction over the case, but also to see if such questions of law were correctly decided. This is upon the fiction that the Board is without jurisdiction to make an award unless all of the conditions necessary to sustain the decision are present, thus making practically all facts necessary to sustain the decision jurisdictional facts for this purpose.⁸⁶ Thus the absence of wilful misconduct is a fact to be established before the Board will have jurisdiction to award compensation, and the appellate court can review the question of wilful misconduct as a jurisdictional fact.⁸⁷

The old requirements of certiorari so far remain,

⁸⁶ *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35.

⁸⁷ *Borgnes v. Falk Co.*, 147 Wis. 327, 360, 133 N. W. 209, 219.

however, as to prevent the appellate court from reviewing errors by the Board or its referees in admitting or rejecting evidence or mere error or irregularity of procedure.⁸⁸

Both by common law and express statutory provision the appellate courts are prevented from reviewing the findings of fact of the Board to determine whether the evidence supports the findings, such findings being conclusive. In practice, the courts have here again modified the common law rules and literal wording of the statute, and have given the findings of the Board, instead of complete conclusiveness, only such immunity from review as are given to the finding of a jury. The rule is variously expressed. Sometimes it is said that if there is no evidence at all to support a given finding, the issue is one of law and reviewable. Again, that a finding cannot be relied upon to establish a jurisdictional fact if there be no substantial evidence, or even no substantial *competent* evidence, to support it. But under no circumstance will the higher court weigh conflicting testimony or determine the weight of evidence generally,⁸⁹ and where there is sufficient competent testimony to support the view taken by the Board, the decision will not be reversed because the court thinks the evidence upon the other side to be stronger, as the credibility of witnesses and weight to be given their testimony is solely for the trier of the facts.

As to rules of evidence, the compensation tribunal is free to admit into the record of the case, for what

⁸⁸ Frankfort General Insurance Co. v. Pillsbury, 173 Cal. 56.

⁸⁹ In Re Von Ette, 223 Mass. 56, 111 N. E. 696.

It may deem it to be worth, any hearsay or other evidence, without regard to the law of evidence, and its decision will not be reversed upon review because of any alleged errors in admission or rejection of testimony. But upon review of its decisions, the tribunal must be able to show to the higher court sufficient competent evidence, after eliminating all hearsay and perhaps other inadmissible testimony, to sustain its decision, and if there is not sufficient competent testimony to sustain the award without the aid of the hearsay evidence, the award will be annulled.⁹⁰

37. Constitutionality of Compensation Acts.— Compensation statutes have been attacked in nearly all states in which they have been passed, upon the ground of unconstitutionality, both as respects the state and Federal constitutions.

Under the Federal Constitution, the claim has usually been made that such legislation violates the 14th Amendment, in that it provides for the taking of the property of the employer without the process of law, and denies him the equal protection of the laws. The specific grounds usually assigned are that it takes the property of the employer when he is not at fault, deprives him of the right of trial by jury, and interferes with freedom of contract. The exclusion from Compensation Acts of farm and agricultural labor, domestic servants and other classes, is usually pointed out as an arbitrary discrimination or class legislation.

As to state constitutions, the same objections have been repeated. It has further been urged, in states

⁹⁰ *Englebreton v. Indus. Acc. Comm.*, 170 Cal. 793, 151 Pac. 420.

where the administration of the Act is left to a Board or Commission, that the creation of such tribunal constitutes an attempt to vest judicial powers in an administrative body, in violation of the fundamental division of government powers between the executive, legislative and judicial bodies.

The opponents of compensation legislation received strong support in the early decision of the Court of Appeals of New York in the case of *Ives v. South Buffalo Railway Company*,⁹¹ which held the New York Act to be in violation of the 14th Amendment of the Federal Constitution, in that it imposed liability upon the employer regardless of fault. Later state courts of last resort have invariably reached the opposite conclusion.⁹² Without discussing the points raised in detail, it is sufficient to say that all constitutional questions arising under the Federal Constitution have finally been put to rest by the decision of the Federal Supreme Court in *New York Central Railroad Co. v. White*.⁹³

The cases above cited take care also of substantially all of the important objections based upon the provisions of state constitutions. In many states the matter has been taken care of by an express amendment to the constitution legalizing compensation legislation. Minor constitutional points may still be

⁹¹ 77 N. Y. 271, 94 N. E. 431.

⁹² *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Hotel Bond Co.*, Appeal, 89 Conn. 143, 93 Atl. 245; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Makin v. Detroit-Timken Co.*, 187 Mich. 8, 153 N. W. 49; *Jensen v. S. P. W.*, 215 N. Y. 514, 109 N. E. 600; *State v. Clausen*, 45 Wash. 156, 117 Pac. 1101.

⁹³ 37 Sup. Ct. Rep. 247.

raised, however, based mainly upon the grant of specific powers to a Board or Commission, where not expressly authorized by the constitutional amendment.⁹⁴ The grant of power to such Board has generally been held not to infringe the doctrine of separation of governmental powers above alluded to.⁹⁵

38. **Conflicts between state and Federal jurisdiction—Railroad cases.**—Jurisdiction over injuries to railroad employees is concurrent, i. e., may be exercised by both the state and Federal governments. In the absence of any legislation by Congress upon the subject, the states may prescribe by statute rules of Employers' Liability or Workmen's Compensation, to apply to all railroad employees, whether engaged in interstate or local traffic. But whenever Congress acts upon the matter, the Federal statute, if constitutional, supersedes all state laws insofar as they may be inconsistent with it; and the Federal jurisdiction to the extent that it has been asserted by statute, becomes exclusive.⁹⁶ The power of Congress to legislate concerning injuries to railroad employees is, however, limited to employees engaged in the interstate traffic of the railroad, and it cannot legislate for employees engaged in local traffic alone.⁹⁷ This is for the reason that its constitutional power to deal with the subject at all is based upon its authority to regulate interstate and foreign commerce. Hence, while the states can, in the absence of Federal ac-

⁹⁴ *Carsten v. Pillsbury*, 172 Cal. 572, 158 Pac. 218.

⁹⁵ *State v. Mountain Timber Co.* (Wash.), 135 Pac. 645.

⁹⁶ *Seaboard Air Line v. Horton*, 233 U. S. 499.

⁹⁷ *Employers' Liability Cases* (*Howard v. Illinois Central R. R. Co.*, 207 U. S. 463).

tion, cover the entire field, the Federal Government can only act to protect railroad employees in interstate service.

In the field of railway employment, the unsatisfactory condition of Employers' Liability common law rules and Employers' Liability statutes in the states led to Federal statutory relief prior to the development of compensation legislation throughout the country. Following certain legislation giving partial relief to railway employees, such as the Federal Safety Appliances Act, an improved Employers' Liability statute was passed in 1906. This Act, termed the First Employers' Liability Law, was declared unconstitutional by the United States Supreme Court in *Howard v. Illinois Central Railroad Company*,⁹⁸ because it attempted to regulate the relation of master and servant in intrastate as well as interstate commerce. Congress thereupon passed the Second Employers' Liability Act,⁹⁹ modified to meet the objection pointed out by the Court. This Act was passed in 1908, and amended in several particulars in 1913. Its constitutionality was sustained by the Supreme Court in the Second Employers' Liability cases,¹ and it is now in force throughout the country. While it is a negligence statute, it excludes state Compensation Acts from the field of interstate injuries, as above pointed out.

The line of demarcation between state and Federal

⁹⁸ *Employers' Liability Cases* (*Howard v. Illinois Central Railroad Co.*, 207 U. S. 463).

⁹⁹ Stat. at L. 65, chap. 149, Comp. Stat. 1913, Sec. 8657.

¹ *Mondou v. New York, N. Y. & H. R. Co.*, 223 U. S. 1, 38 L. R. A. (N. S.) 44.

jurisdiction is very indistinct and incapable of accurate definition. In general, it may be said that injuries sustained by railroad employees while engaged in the operation of trains bearing interstate passengers, freight or express, come under the Federal Act. Any service rendered to such train, however slight, comes within the Federal law. It is unnecessary that the injured employee cross the state line in the course of his service, any direct facilitation of an act of interstate carriage being sufficient. So also, injuries sustained while making repairs to objects permanently devoted to the carriage of interstate freight, such as tracks, roadbed, bridges or tunnels, even though such tracks be used indiscriminately for both interstate and intrastate commerce. But new construction work, as building new lines, tunnels, buildings, engines, cars and repairs to locomotives or cars while temporarily withdrawn from service, as distinguished from repairs made during a trip to facilitate its completion, are within the state law.

39. **Same—Maritime cases.**—In the field of admiralty and maritime law, the jurisdiction of the Federal Government is exclusive and not concurrent, even in the absence of Federal statute. This is for the reason that there is what might be termed a common law of admiralty, enforceable in the Federal courts under the name of the "law maritime." For this reason no state Compensation Act can lawfully contravene established principles of maritime law, and it has accordingly been held by the United States Supreme Court, in the case of *Southern Pacific Com-*

pany v. Jensen,² that the New York Compensation Act cannot provide a remedy for the death of a stevedore due to injury sustained while loading a vessel.

The decision in the Jensen case above referred to was by a divided court, a five to four decision. The majority opinion was unsatisfactory and lead eventually to enactment by Congress of the Longshoremen's and Harbor Workers' Compensation Law, providing for compensation for disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The state workmen's compensation laws of course are applicable to an injury that occurs on land and also to an injury which occurs on navigable water in furtherance of a maritime contract, only, however, when the contract is of local concern, does not bear directly on navigation or commerce, and would not interfere with the uniformity of general maritime law in its interstate or international aspects.

It is the policy of Congress to leave to the states, as far as possible, the opportunity to provide compensation to workers for industrial accidents, and such policy has been continued in the present law pertaining to harbor workers. By this law, too, the requirement of uniformity in matters of maritime jurisdiction is maintained.

As the law now stands, to bring a case of injury

² Sup. Ct. R. 524.

³ Schoonmaker v. Gilman, 102 U. S. 118.

an employee within the Federal admiralty jurisdiction, and out of the coverage of a state Compensation Act, the following requisites should concur: (1) the injury should occur upon a vessel; (2) the vessel should, at the time of the injury, be afloat upon navigable waters of the United States or foreign countries, or upon the high seas; (3) the employee should be engaged in service of a maritime character, e., as a seaman, stevedore, etc.

40. **Extraterritorial effect of Compensation Acts.**

A state Compensation Act necessarily applies to all injuries covered by it which occur within its borders. Whether it also covers injuries sustained outside the state, is difficult to decide. In states having elective Compensation Acts, it is usually held that the statute is an implied portion of every contract of hire created within the state, provided the employer and employee have elected to come under the statute, and therefore the law applies to all injuries occurring in the course of the employment, whether within or without the state.⁴

In states where compulsory laws obtain, the contractual theory is inapplicable, but the legislature may expressly extend the compensation statute to cover injuries outside the state. In the absence of express legislative declarations, it will be presumed that no extraterritorial effect was intended.⁵ Even in cases where such express declaration exists, it is necessary that the state be in some way concerned with the extraterritorial injury to give it jurisdic-

⁴ *Bounseville v. Wright & Co. Lighterage Co.* (N. J.), 94 Atl. 392.

⁵ *Gould's Case*, 215 Mass. 480, 102 N. E. 693.

tion, as by the contract having been made within the state, or the injured employee or employer, or both, having permanent residence within the state, so that the statute regulates a local industry, or protects one of its citizens from becoming a public charge.

Injuries upon the high seas, where not within the jurisdiction of the admiralty courts, are governed by the law of the state in which the ship is registered, even in the absence of a declaration of legislative intent to give extraterritorial effect to its Compensation Act, as the ship is deemed a floating part of the territory of such state.⁶

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⁶ *Kruse v. Pillsbury*, 164 Cal. —, 162 Pac. 891.

QUIZ QUESTIONS

EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION

(The numbers refer to the numbered sections in the text.)

1. What does this article embrace?
2. What is the basis of a master's responsibility for injuries caused by his servants to third parties, and for injuries sustained by the servants themselves?
3. What is meant by the "assumption of risk doctrine"?
4. What is the basis of the "fellow-servant doctrine"?
5. Who are fellow-servants?
6. Who are "superior servants"?
7. What exceptions are made to the fellow-servant rule?
8. What is the "vice-principal doctrine"?
9. What are the non-assignable duties of the employer?
10. Distinguish a vice-principal from a fellow-servant.
11. What is the effect of an employer causing the injury of an employee by his own personal negligence?
12. To what extent can an employee free his employer from liability by a contract made prior to the injury?
13. What recourse has an injured employee against the fellow-servant who injures him?
14. What effect does the negligence of the employee himself have?
15. Upon whom does the burden of proof rest to fix liability upon an employer?
16. What are some of the common statutory changes in the law of Employers' Liability?
17. What is the basis of Workmen's Compensation Acts?
18. What part does insurance play in compensation systems?

19. In what country was the first compensation legislation enacted?
20. Name and describe the different kinds of Compensation Acts.
21. What employees are usually not included?
22. When is an employer liable to compensate injured employees?
23. What is an accident; an occupational disease?
24. What is "proximate cause"?
25. When is an employee "disabled"?
26. Who are "dependents" of a deceased employee?
27. When does an injury occur in the course of the employment?
28. When is an employee entitled to compensation for assault by a third person?
29. What is the theory of compensation payments?
30. How soon after an accident should an employer be notified?
31. What is wilful misconduct?
32. What are the characteristic features of procedure under Compensation Acts?
33. What bodies try compensation cases?
34. How do pleadings in compensation cases differ from those used in ordinary court litigation?
35. What is the effect of admitting and using hearsay evidence?
36. How are compensation decisions reviewed by the higher courts?
37. Are Workmen's Compensation Acts constitutional?
38. In what cases are railroad employees entitled to compensation when injured?
39. To what extent are seamen entitled to compensation?
40. Does a Compensation Act apply to injuries occurring outside the state?

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